E.I. du Pont de Nemours & Company *and* Paper, Allied-Industrial, Chemical and Energy Workers, International Union, and Its Local 1-6992. Cases 3–CA–22854, 3–CA–23066, 3–CA–22957, and 3–CA–23275

February 27, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 24, 2003, Administrative Law Judge John T. Clark issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel and Charging Party both filed briefs in support of the judge's decision and answering briefs to the Respondent's exceptions. The Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified[2] and to adopt the recommended Order as modified and set forth in full below.[3]

The complaint in this case alleges various violations of Section 8(a)(5) and (1) of the Act. As set forth below, we reverse the judge's finding that the Respondent violated the Act by declaring impasse in contract negotiations and implementing the terms of its final contract offer. We adopt the judge's finding that the Respondent's failure adequately to respond to the Union's information requests violated Section 8(a)(5) and prevented a lawful impasse in negotiations over subcontracting milling and finishing work. Thus, the Respondent's subsequent subcontracting of this work in the absence of a lawful impasse further violated Section 8(a)(5). For the reasons stated by the judge, we agree that the Respondent also violated Section 8(a)(5) by failing adequately to respond to the Union's request for information with regard to the discipline of Supervisor Angelo Paradise.[4] Finally, we reverse the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally changing the employees' health benefits.

I. THE RESPONDENT'S DECLARATION OF IMPASSE IN CONTRACT NEGOTIATIONS

A. The Facts

The facts, more fully set forth in the judge's decision, are as follows. The Respondent operates a plant in Tonawanda, New York (known as the Yerkes site), where it manufactures Tedlar and Corian. Tedlar is used to laminate a variety of surfaces. Corian is a trademark solid surface material used in kitchen, bath, and for recreational applications. Corian shapes (sinks and bowls) are made by casting or pouring Corian into molds. The molded shapes are then milled by mill operators, who remove an outer edge of flange and drill drain holes. After the bowls are milled, employees classified as class 2 top finishers, using hand polishing sanders, "finish," or sand the Corian shapes to remove the gloss and any de-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by: (1) delaying providing information in response to the Union's September 28, 2000 information request until March 12, 2001; (2) failing adequately to respond to the Union's January 19, 2001 request for information regarding gifts and incentives; (3) denying union representatives access to certain facilities to investigate potential grievances and refusing to bargain over visitation of jobsites where bargaining unit work was being performed; and that it violated Sec. 8(a)(1) of the Act by threatening union representatives with discipline if they failed to leave the Tonawanda facility. In addition, no exceptions were filed to any of the judge's recommended dismissals.

We grant the parties' motion to reopen the record to correct errors in the transcript and to include the amended Second Amended Consolidated Complaint issued by the General Counsel on October 10, 2002.

[2] We correct the judge's inadvertent error in his Conclusion of Law 17. That sentence shall state: "The Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally implementing a production incentive program."

Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent was permitted to call to the Board's attention its recent decisions in *Courier-Journal*, 342 NLRB No. 113 (2004), *Sonic Automotive*, 343 NLRB No. 116 (2004), *E. I. du Pont & Co.*, Case 9–CA–40777, NLRB Div. of Judges (2004), and *E. I. du Pont & Co*, Case 4–CA–333620 NLRB Div. of Judges (2005). The Board also permitted the Charging Party to call to the Board's attention its recent decision in *Larry Geweke Ford*, 344 NLRB No. 78 (2005).

[3] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall also substitute a new notice in conformity with the Order as modified.

[4] In adopting the judge's finding that the Respondent violated the Act by refusing to provide information with regard to the discipline of Angelo Paradise, Member Schaumber notes that he would not require the production of raw investigative notes in every instance. Here, however, the Respondent was required to seek an accommodation to protect employee privacy while providing necessary information to the Union and no such accommodation was attempted. Rather, the Respondent took it upon itself to decide that production of the summaries was sufficient.

fects. The milling and finishing work is done in the Corian closed mold casting (CCMC) department.

The Respondent's production and maintenance employees, including mill operators and CCMC finishers, were originally represented by the Buffalo Yerkes Union (BYU). In 1977, the Respondent and the BYU signed a collective-bargaining agreement that contained an evergreen clause allowing the parties to renegotiate portions of the agreement at the request of either party. The rest of the agreement would remain in effect from year-to-year, unless one party gave notice to terminate, modify, or change the agreement. Since 1985, pursuant to the evergreen clause, wages have been negotiated annually at the request of one party or the other and benefits have been negotiated on an ad hoc basis.

In 1993, the Respondent gave notice that it intended to terminate the collective-bargaining agreement, and the parties commenced bargaining over a successor agreement. In 1994, the Respondent declared impasse in negotiations and implemented the terms of its final offer. Included in those terms were plans to curtail overtime "pyramiding" (overtime for all hours worked in excess of 40 in a week or 8 in a day), and changes to the Respondent's health benefits. BYU filed unfair labor practice charges over the Respondent's implementation of its final offer and the parties entered into an informal settlement agreement in 1997. The settlement agreement rescinded the changes to the overtime structure and froze the percentage of the employees' contribution to health care premiums at the 1996 level—80 percent to be paid by the Respondent, 20 percent to be paid by the employees—until the parties reached agreement or lawful impasse on this issue. In 1998, the parties resumed negotiations for a successor agreement and the Respondent again presented a final offer. The unit employees rejected this offer and the parties resumed negotiations.

Between 1985 and 1995, offsite contractors, who were not unit employees, performed all milling and finishing work. In 1995, the Respondent decided to resume in-house milling and finishing at the Yerkes site. In negotiations that were separate from contract negotiations (which were then at a stalemate), the Respondent and BYU negotiated the 1995 "CCMC Finisher Agreement," which covered finishing work but not milling work, and implemented a job description for class II top finishers at a reduced wage rate. The agreement established a goal that 85 percent of the finishing work, with some exceptions, would remain onsite at the Respondent's facility. BYU agreed to a lower pay grade for Yerkes site finishing employees in exchange for assurances that finishing work would remain at the Yerkes facility and not be subcontracted. During the course of negotiations over this work, the Respondent stated that improved technology would eventually rule out the need for milling and finishing work entirely. The agreement provided that either party could terminate the agreement after the first year with 120 days notice. The parties operated under this agreement from 1995 to 2001.[5]

In June 1999, the BYU affiliated with Charging Party, Paper, Allied Industrial, Chemical and Energy Workers, International Union (PACE), which was recognized by the Respondent as the unit employees' bargaining representative. These parties continued to meet to negotiate a successor agreement. The meetings were organized into two types: executive board meetings, which dealt with day-to-day issues, and contract negotiation meetings, which dealt with larger contract issues. Between November 1993, when the Respondent announced that it wished to reopen contract negotiations, and the Respondent's April 12, 2001 declaration of impasse, the parties participated in over 170 bargaining sessions. PACE participated in at least 60 of these meetings between 1999 and 2001.

On January 12, 2001, the Respondent presented a final contract offer that included changes to the CCMC finisher agreement, and increases in the rate of pay for finishing employees but did not include, as in previous agreements, a percentage goal for onsite finishing. The Respondent's offer also contained provisions eliminating overtime pyramiding and unfreezing the percentage of the employees' contribution to healthcare premiums set by the 1997 settlement agreement.

Shortly thereafter, on January 26, 2001, Plant Manager Doc Adams informed the Union that the Respondent was exploring technologies that would automate milling and finishing work, thereby eliminating the need for those positions. On February 28, 2001, the Respondent terminated the CCMC agreement (effective June 29, 2001), citing the need to accelerate the implementation of automated milling and finishing technology. The Union, concerned that the Respondent intended to subcontract milling and finishing work, submitted information requests, on March 6, 2001, inquiring into the effect that termination of the CCMC agreement would have on milling and finishing work.

At a March 19, 2001 contract negotiation session, the Respondent withdrew its revised CCMC agreement proposal from its final offer. The Respondent stated that it hoped to eliminate milling and finishing work entirely by the following January. The Respondent's representative

[5] The Respondent's 1998 final contract offer contained a new proposed CCMC agreement but, as noted, the unit employees voted to reject this offer.

also informed those present that CCMC issues would no longer be discussed during contract negotiations because the remaining contract issues dealt with day-to-day operations and not union questions regarding the removal of milling and finishing work from the facility. The Union responded that it would "give that some thought." The Union subsequently prepared a proposal to alleviate certain bottlenecks in the milling and finishing process but this proposal was rejected by the Respondent, which reiterated that CCMC issues would not be discussed during contract negotiations.

On April 2, 2001, the Respondent's corporate headquarters announced that it intended to restructure certain of its business operations. As a result, Plant Manager Adams circulated a memo stating that management of the Yerkes facility intended to focus on the profitability of its finishing operation. In addition to the incorporation of the new milling and finishing technology, Adams' memo also noted that the Respondent intended to conduct a feasibility study to determine whether subcontracting the milling and finishing work would provide the Respondent with a business advantage.

At an April 5, 2001 contract negotiation session, 3 days later, the Respondent's bargaining representatives informed the Union that the feasibility study was completed and the Respondent determined that it could save $1 million in a 12-month period by subcontracting the milling and finishing work. The Respondent's representatives informed the Union that unless the Union could devise a plan that would provide for a comparable savings in labor costs, milling and finishing work would be subcontracted on June 29, 2002, and all of the class 2 finishers as well as the milling operators would no longer perform those jobs. The Respondent subsequently changed the date for subcontracting to May 1, 2001.

On April 12, 2001, the Respondent declared impasse in contract negotiations and announced that it would implement its final contract offer (submitted to the Union on January 12, 2001) on April 23, 2001. The impasse related to overtime pay and health care costs. The Respondent's most recent contract proposals included a self-insured managed care plan and elimination of double overtime "pyramid" provisions. On April 23, 2001, the Respondent implemented its final contract offer.

The parties continued to meet in executive sessions to discuss the removal of milling and finishing work from the Yerkes site. Then, on April 30, 2001, the Respondent informed the Union by letter that it intended to eliminate the 53 milling and finishing positions entirely by July 1, 2001. The following day, the Respondent declared impasse in bargaining over the subcontracting of the milling and finishing work and commenced subcontracting the work.

B. The Judge's Opinion

The judge found that the decision to subcontract the milling and finishing work was a mandatory subject of bargaining. He then found that the Respondent rigidly and unreasonably fragmented negotiations by removing discussion of milling and finishing work from its negotiation of other contract issues. He concluded that this bifurcation of bargaining violated the Act. In support, the judge relied on *E. I. du Pont & Co.*, 304 NLRB 792 (1991) (*du Pont Spruance*), a case involving the Respondent's Spruance, Virginia location. There, the employer insisted that negotiation on proposals regarding two unit positions were not part of contract negotiations and declared impasse on the remaining contract negotiations. The Board adopted the administrative law judge's finding that the employer approached the bargaining table with a fixed determination to implement its proposals regardless of the status of negotiations, and that there was no lawful impasse. Thus, the implementation of the employer's final offer violated the Act.

The judge in the instant case similarly found that the Respondent "demonstrated a 'fixed determination' to implement its final offer in contract bargaining while still maintaining the flexibility to achieve an advantageous decision in bargaining over a major subcontracting issue." In support, the judge cited the Respondent's refusal to discuss CCMC issues during contract negotiations, cancellation of the CCMC agreement, and rescission of its CCMC proposal.

The judge rejected the Respondent's argument that the Union acquiesced to separate bargaining by attending the separate negotiation meetings, finding instead that the Union did so out of necessity. The judge noted that, to waive a statutory right, such as the right to good-faith bargaining, a party must make a "clear and unmistakable waiver." The judge found that the Union made no such waiver and its attendance at negotiating meetings did not constitute waiver.

The judge concluded that the Respondent's unlawful bifurcation of bargaining prevented a lawful good-faith impasse because its separation of a major subcontracting issue from the rest of contract bargaining diverted the Union's attention away from contract negotiations. The judge also found that by separating the issue of the subcontracting of the milling and finishing work from contract negotiations, the Respondent prevented the Union from possibly formulating a contract proposal that would provide for the savings the Respondent was seeking to obtain through subcontracting. Given this, the judge concluded that the Respondent's unlawful bifurcation of

bargaining tainted the impasse in contract negotiations. Therefore, the judge concluded that the Respondent violated the Act when it unilaterally implemented the terms of its final offer.

C. Analysis

As an initial matter, we conclude that it was not unlawful for the Respondent to separate out, from general bargaining, the issue of subcontracting the milling and finishing work. That issue was historically separate. Indeed, that work was not even in the unit, i.e., it was subcontracted, for about 10 years. In addition, the parties had an established past practice of bargaining certain issues separate and apart from general contractual issues, and the Respondent's actions here were consistent with this past practice. Such bargaining was established as a fundamental tool used by the parties, as evidenced by the contract's evergreen clause. This clause allowed the parties to negotiate components of the contract while the remainder of the contract's terms remained in effect. The parties utilized this clause throughout the life of the contract, negotiating and implementing new terms in discrete areas, such as bonuses, wage increases, and health benefits. The parties also maintained standing committees, such as the job-ad committee, which met to discuss job descriptions and rates of pay separate from contract bargaining. Indeed, the CCMC agreement itself was originally proposed, negotiated, and implemented separate and apart from the rest of the contract. Given this history of piecemeal bargaining, we would not find that the Respondent unlawfully bifurcated bargaining in the instant case.

Our colleague would find that the Respondent unilaterally imposed piecemeal bargaining on the Union without its consent. At the same time, however, the dissent recognizes that the Respondent and the Union had engaged in separate bargaining on these same issues in the past. The dissent posits that this past practice should not be considered now in determining whether the bifurcated bargaining was lawful because those earlier instances did not occur when the entire contract was being negotiated. We disagree. Beginning in 1995, i.e., at the very inception of the in-house milling and finishing work, the parties have willingly bargained separately for that operation.[6] That separate bargaining was simultaneous with the general negotiations. Indeed, although those general negotiations had reached a stalemate, a separate agreement was reached for the finishing work. That separate agreement remained in force until the events herein. On February 28, 2001, the Respondent gave notice of intent to terminate that agreement effective June 29, 2001. On March 19, 2001, the Respondent stated that it hoped to eliminate the milling and finishing operations by the following January. Although the Union subsequently made a proposal to retain that operation, it never protested on the ground that the negotiations were separate.[7]

Further, even if the bifurcation of bargaining was unlawful, it did not taint the bargaining impasse that was reached on general contract issues. At the time of the impasse, the parties had been actively working to negotiate a successor contract since 1993. Since PACE became the representative of the bargaining unit employees, the Respondent and PACE participated in at least 60 bargaining sessions between 1999 and 2001. Throughout this time, two issues remained unresolved. Thus, the parties had been unable to reach any accord on the allocation of healthcare premiums, or on the issue of overtime pyramiding under which the Respondent was required to pay overtime to employees once they had worked either 8 hours in a day or 40 hours in a week. Because these two issues remained outstanding, the Respondent had declared impasse on at least three prior occasions. There is no convincing evidence that the Respondent's bifurcation of bargaining and announcement of its decision to subcontract milling and finishing work had a substantial impact on the failure of the parties to reach agreement on the unresolved contract issues. In sum, it is clear that the parties were deadlocked on two core issues, and the bifurcation of bargaining had little, if any, bearing on those issues. See *Sierra Bullets, LLC*, 340 NLRB 242, 244 (2003) (no evidence that employer's conduct precluded lawful impasse since it had no relationship to issues that were deadlocked).

Our colleague would characterize the Respondent's January 2001 declaration of impasse as "rhetorical" and premature and argues that the separation of the subcontracting talks from overall contract negotiations tainted the impasse. However, the dissent gives insufficient weight to the long history of separate bargaining between the parties. Thus, the impasse was not tainted. And, on

[6] Contrary to our colleague, we have not placed "undue reliance" on the fact that in 1995 the parties negotiated a separate agreement regarding milling and finishing work. Rather, as explained in detail above, those negotiations occurred in the context of the parties' extended separate negotiations over myriad matters, as evidenced by the evergreen provision in the contract. We find that *all* of the parties' bargaining history is relevant to determining whether the Respondent's actions here were lawful.

[7] Thus, we would find that *Trumball Memorial Hospital*, 288 NLRB 1429 (1988), relied on by the dissent is distinguishable. In that case, the hospital refused to discuss economic issues until the parties first discussed noneconomic issues and refused to present any economic proposals until the union withdrew or agreed on noneconomic issues. Here, however, the Respondent engaged in no such conduct; bargaining on both the subcontracting issue and the general contract terms occurred simultaneously, albeit in separate forums.

the issue of whether there was an impasse in fact, the Union offered no proposal to deal with the outstanding overtime or health care issues in the contractual negotiations. Thus, we would find that this case is distinguishable from *du Pont Spruance*, 304 NLRB 792 (1991), relied upon by the dissent. In that case, the employer insisted on separating bargaining on its proposals concerning two unit positions from general negotiations on a collective-bargaining agreement. The union made several attempts to "horse trade" on contract proposals, but was rebuffed by the employer, who remained firm that certain matters would not be included in contract negotiations. Here, by contrast, there is no evidence that the Union attempted to offer contract proposals that would affect the milling and finishing subcontracting issues or vice versa.[8] We therefore reverse the judge's finding that the Respondent's declaration of impasse and implementation of the terms of its final offer was unlawful.

II. THE RESPONDENT'S DECLARATION OF IMPASSE ON THE SUBCONTRACTING OF MILLING AND FINISHING WORK

The judge alternatively found that the Respondent and the Union failed to reach a lawful good-faith impasse on the issue of subcontracting milling and finishing work because unremedied unfair labor practices, namely, the Respondent's unlawful refusal to adequately respond to the Union's information requests, tainted such impasse. We agree with the judge's conclusion.

Following the Respondent's announcement of its intention to subcontract milling and finishing work on April 5, 2001, the Union submitted a detailed information request directed at 22 specific items. This request sought information relating to the Respondent's transformation plan, the feasibility study and the specific information upon which the Respondent relied in determining that subcontracting milling and finishing work would be more economically viable. The Union's request also sought such items as copies of the transformation plan and feasibility study as well as payroll records for milling and finishing employees, sample contracts with potential subcontractors, and current subcontracts for milling and finishing work. The Respondent replied by letter dated April 10, 2001, providing the Union with a single draft document between the Respondent and an outside vendor and accounting summaries generated from the feasibility study. On April 16, 2001, the Union reiterated its request for a copy of the transformation plan, feasibility study, and other documents upon which the Respondent relied in calculating the potential savings related to subcontracting milling and finishing work. The Union also requested documentation on how certain labor costs were calculated and copies of contracts between the Respondent and certain subcontractors. The Respondent confirmed receipt of the renewed request, and provided the Union with service agreements with subcontactors.

On April 23, 2001, the Union submitted another request seeking payroll records for various mill operators and other employees. The Union informed the Respondent that it did not believe that the Respondent had adequately responded to its requests for documentation supporting the Respondent's feasibility study and conclusion that the Respondent would save $1 million over 12 months by subcontracting milling and finishing work. For instance, the Union repeated its request that the Respondent explain how it concluded that 40 percent of its labor costs emanated from benefits. Throughout April, the Respondent provided the Union with many of the requested items, including thousands of pages of payroll records.

The judge found that the Respondent failed adequately to respond to seven of the Union's information requests. These items included: (1) actual hard costs, with supporting numbers, of labor and benefits; (2) supervisory labor costs; (3) the style, number, and color of finished bowls; (4) service agreements with certain subcontractors going back in time to 1994; (5) subcontracts for milling and finishing work the Respondent entered into prior to returning the work to the Yerkes site; (6) contracts between the Respondent and subcontractor Jaco, spanning the 3 years prior to the Respondent's decision to bring milling and finishing back to the Yerkes site, and; (7) vendor quotes reflecting the actual costs of outsourcing milling and finishing work. The judge found that these requested items were relevant and that the Respondent failed to provide the requested information or provided incomplete summaries. The Respondent argues that it provided the Union with a great deal of information, most of which was deemed unsatisfactory by the Union. The Respondent additionally argues that the Union was using the information requests to stall negotiations and postpone any declaration of impasse on this issue.

We agree with the judge that the foregoing requested documents are relevant to the bargaining over the subcontracting issue. Although, as the Respondent asserts, PACE made multiple requests, seeking a large number of documents, many of these requests were the result of the Respondent's reliance on generalized or bundled figures in making its cost determination. In order to assess the accuracy of the Respondent's claims, it was necessary for

[8] See *E. I. du Pont & Co.*, 268 NLRB 1075 (1984). There, the Board found that the employer did not violate the Act when it implemented a proposed job movement policy while there was neither agreement nor impasse on other outstanding contractual issues. In so finding, the Board noted that the union gave no indication that it would concede on job movement in return for a favorable tradeoff in another area.

the Union to examine the data that formed the basis for the Respondent's conclusions. For example, the Union's request for the hard costs of labor and benefits is relevant and essential to the Union's ability to assess the Respondent's assertion that such costs constituted 40 percent of its labor costs, a figure that the Union disputes. Similarly, the Union's request for supervisory labor costs was an attempt by the Union to assess the accuracy of the Respondent's proposed labor savings, which cited to bundled supervisory costs. The request for information on the style, number, and color of the finished bowls was relevant to the Union's assertion that certain more complicated tasks were being completed in-house, and their costs had not been factored into the subcontracting figures. The Union's request for Respondent's previous agreements with subcontractors was relevant to assess the degree to which damage costs were affected by subcontracting. The Union's requests for previous subcontracting agreements, copies of the Respondent's agreement with Jaco, and vendor quotes were necessary to track the long-term cost of subcontracting and compare the actual costs of offsite work with work performed onsite. Given the clear relevance of these documents, we agree with the judge that the Respondent violated the Act by failing and refusing to provide this information.

It is well settled that a party's failure to provide requested information that is necessary for the other party to create counterproposals and, as a result, engage in meaningful bargaining, will preclude a lawful impasse. See *Decker Coal Co.*, 301 NLRB 729, 740 (1991); *Pertec Computer*, 284 NLRB 810, 812 (1987), supplemented by *Triumph-Adler-Royal*, 298 NLRB 609 (1990), enfd. as modified sub nom. *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181(2d Cir. 1991), cert. denied sub nom. *Auto Workers Local 376 v. Olivetti Office U.S.A., Inc.*, 502 U.S. 856 (1991). Here, the Respondent asserted that subcontracting milling and finishing work would save $1 million over a 12-month period and challenged the Union to formulate a proposal that would provide for similar savings without subcontracting. By refusing to provide the information upon which it relied in making the decision to subcontract, the Respondent prevented the Union from effectively creating a counterproposal. In light of the Respondent's failure to provide substantial and necessary information that related directly to the bargaining issues at hand, we find that the Respondent "prevented a full exploration of the subjects on which the Union would have to concede in order to present useful alternatives" to the Respondent's proposed subcontracting. *Pertec*, supra at 812. This failure to supply relevant and necessary information constitutes a failure to bargain in good faith, precluding a lawful impasse.

Sierra Bullets, LLC, 340 NLRB 242 (2003), cited by the Respondent, is distinguishable. In that case, the parties had deadlocked over four issues. The union's information request concerning overtime work did not relate to the four issues over which the parties were at impasse. The Board concluded that the unfulfilled information request alone did not preclude a finding of a lawful impasse, because the information did not bear on the core issues, and there was no showing that providing the information would have altered the fact that the parties were deadlocked. Here, by contrast, the Respondent presented the Union with an expedited plan to eliminate milling and finishing work through subcontracting. The Union's information requests dealt specifically with that issue. In these circumstances, had the Respondent provided such information, it is at least possible that the parties could have achieved some movement on the proposals at issue. Therefore, in the absence of a lawful impasse, we agree that the Respondent violated Section 8(a)(5) in subcontracting the milling and finishing work.[9] See *Titan Tire Corp.*, 333 NLRB 1156, 1159 (2001) (finding that in the absence of a good-faith impasse in bargaining, an employer may not unilaterally implement its final offer).[10]

III. THE RESPONDENT'S UNILATERAL IMPLEMENTATION OF CHANGES IN ITS HEALTHCARE BENEFITS

Since 1991, the Respondent has provided employees with healthcare benefits administered through the Beneflex Flexible Benefits Plan (Beneflex), an employer-sponsored benefit program that covers medical, dental, vision, and life insurance and also includes a vacation buy back program. Initially, Beneflex supplemented employees' health policies provided by other companies, such as Blue Cross. However, in 1993, the Respondent eliminated its support of all other insurance options, leaving Beneflex as the sole provider of health benefits.

Throughout the life of the Beneflex program, the Respondent and the Union have negotiated its provisions separate from contract bargaining, with the Respondent often making unilateral changes to Beneflex coverage,

[9] Member Schaumber agrees that at least some of the requested information that the Respondent failed to provide was relevant and necessary to the parties' discussion of the subcontracting issue. Accordingly, he agrees with his colleagues' finding that the Respondent's failure to respond to the Union's information requests precluded impasse on the subcontracting issue. However,he views this as a close issue, and notes that the Board will not turn a blind eye to party manipulation of information requests to prolong negotiations and preclude an otherwise valid impasse.

[10] We agree with the judge, for the reasons he states, that a restoration remedy is appropriate. Should the Respondent wish to argue that such a remedy is unduly burdensome, it may do so during the compliance portion of these proceedings.

copays, stop losses, and deductibles. The Respondent does so pursuant to a clause in the Beneflex plan that provides:

> The company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year. Termination of this Plan or any benefit plan incorporated herein will not be effective until one year following the announcement of such change by the Company.

In 1993, the Respondent proposed eliminating all other insurance options, and replacing them with a self-funded, managed-care Beneflex plan. The Respondent also proposed changing the allocation for premium contributions. At the time, the Respondent paid 80 percent of Beneflex's costs and employees paid 20 percent. The Respondent proposed gradually increasing the percentage of employee contributions until the cost was shared equally by the Respondent and employees (i.e., 50/50) by January 1, 1997. The Union rejected both these proposals and, after unsuccessful negotiations, the Respondent implemented its final offer that included the elimination of other providers and enactment of the cost share plan. The Union filed unfair labor practice charges, which were ultimately settled by an informal settlement agreement. This settlement "froze" the cost share at the 1996 (75/25) level until "agreement or good-faith impasse in bargaining is reached." The parties continued to negotiate the issue of health care cost sharing while operating under the terms of the settlement agreement.

On January 12, 2001, as noted above, the Respondent presented the Union with a final contract offer that retained the Beneflex plan (with an added HMO option), and included a provision regarding the percentage of health care cost sharing, which states:

> Participants will pay for premiums, co-pays, co-insurance and deductibles established for a particular plan year. (The projected du Pont participant cost share for year 2001, based on actuarial analysis, is 75/25.) Projected increases for future plan years will be shared equally between du Pont and participants, provided, however, such increases may be allocated to premiums, components of plan design, or any combination thereof.

This clause would unfreeze the 75/25 cost share percentage and permit the Respondent to increase the percentage of employee contribution to a 50/50 split over the next 2 years.

In October 2001, the Respondent announced a number of changes to the Beneflex plan, such as reductions in certain premiums, increases in other premiums, additions of new benefits, and increases in the percentage of the employee contributions. The Union protested, arguing that the Respondent was obligated to bargain in good faith over these changes. The Respondent proceeded to implement its changes.

The judge concluded that the Respondent unlawfully implemented its healthcare proposal. The judge first rejected the Respondent's reliance on past practice in making unilateral changes to the percentage of employee cost share, finding that percentage had been fixed as a result of the 1997 settlement agreement. The judge next found that the Respondent could not implement the healthcare costs postimpasse because the healthcare provision granted the Respondent unfettered discretion to make changes without bargaining or notice.[11] Relying on *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998), and *KSM Industries*, 336 NLRB 133 (2001), reconsideration granted in part 337 NLRB 987 (2002), the judge found that the proposal in the Beneflex provision gave the Respondent the sole discretion to unilaterally change the provider, the plan design, and the level of benefit without negotiation or discussion. The judge explained that, under *McClatchy* and *KSM*, an employer may not unilaterally implement upon impasse clauses that reserve sole discretion to the employer to make changes to rates of pay or health care in the future without an obligation to bargain with the union. Finally, the judge found that the Union did not waive its right to bargain over the health care terms. Given these findings, the judge concluded that the Respondent violated Section 8(a)(5) of the Act by its postimpasse implementation of the health benefit plan.

Contrary to the judge, we do not find that the Respondent's implementation of its healthcare proposal violated the Act. Rather, we find that the parties were at impasse over this proposal, and the Respondent could lawfully implement its plan. Even assuming that there was no past practice with regard to the health care cost allocation and no waiver by the Union to bargain over these provisions, we find that the parties were at a lawful impasse and the Respondent did not violate the Act by implementing the terms of its final offer.

Further, contrary to the judge, we find that *McClatchy*, supra, and *KSM*, supra, are distinguishable from the instant case. In *McClatchy*, the parties bargained to im-

[11] In finding that the Respondent violated the Act, the judge did not rely on his earlier finding that the Respondent's April 12, 2001 declaration of impasse in contract negotiation was not lawful.

passe over a clause that reserved to the employer sole discretion to determine future merit pay increases. Following impasse, the employer implemented the merit pay proposal and awarded individual employees merit pay increases. The Board recognized that ordinarily upon impasse, an employer may establish new terms and conditions of employment as set forth in its bargaining proposals. In *McClatchy*, however, the Board crafted a narrow exception to the implementation-upon-impasse rules for clauses that confer on an employer broad discretionary powers that effect recurring unilateral decisions regarding changes in the employees' rates of pay. The Board reasoned that allowing the employer to implement upon impasse a clause that reserved the right to unilaterally exert unlimited managerial discretion over future pay increases would be "so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." *McClatchy*, 321 NLRB at 1391. Similarly, in *KSM*, the Board found that an employer may not implement upon impasse a clause that reserved sole discretion to the employer to change various aspects of its medical benefits without discussion with or notice to the union. In both cases, the parties bargained to impasse over the provision granting the employer broad discretion on mandatory subjects of bargaining and, upon declaration of impasse, the employers sought to use that clause to make changes to pay rates and health benefits without notice or bargaining. Because these provisions permitted the employers to unilaterally change the manner, method, and means of providing terms and conditions of employment that were of paramount importance, the Board found that they were "inimical to the postimpasse, on-going collective-bargaining process" envisioned under the Act. *KSM*, 336 NLRB at 135.

In the instant case, the contractual provision that the Respondent implemented postimpasse is a narrow, specific clause that, by its terms, sets limits on the Respondent's discretion to act with respect to healthcare. The Respondent's final offer included a provision that would phase in a specific change in its cost allocation structure. The premium increase as set forth in the Respondent's final offer did not accord the Respondent unfettered discretion to change the cost share percentage. Rather, the clause that the Respondent implemented specifically stated the grounds upon which future increases would be based: "shared equally between du Pont and participants." Furthermore, unlike the changes implemented by the employers in *McClatchy Newspapers* and *KSM Industries*, the Respondent's change in the cost share percentage was specifically bargained to impasse. By contrast, in *McClatchy* and *KSM*, the parties bargained to impasse over provisions under which the employers retained broad, discretionary rights, and where the employers subsequently sought to implement changes in rates of pay and health care, respectively, without bargaining. Thus, the instant case does not involve the implementation of a broad discretionary provision, but rather the implementation of a fixed, narrow health care term over which the parties had bargained to impasse.[12] Given that the parties had bargained to lawful impasse on the health care proposal, we find that the Respondent did not violate the Act by implementing its final offer.[13]

Under *McClatchy*, supra, an employer cannot implement (i.e., take action) pursuant to a clause that gives it unfettered discretion to act, even if the clause itself was placed into effect after impasse. However, in the instant case, the clause did not give the Respondent unfettered discretion to act, i.e., the clause was not a *McClatchy* clause. Thus, after the clause was lawfully placed into effect after impasse, the Respondent was free to act within its terms.

We recognize that, as in *McClatchy* and *KSM*, the Respondent's Beneflex healthcare plan contains a broad provision that, on its face, permits the Respondent to make changes in the plan, including prices and level of coverage, subject to a time limitation (at time of annual enrollment). However, this provision predated current negotiations, and indeed had always been included in the Beneflex plan. Thus, this was not a new proposal that the Respondent was offering. The specific provision offered during the instant negotiations specifically concentrated on premium allocations, and spelling out the current and projected share of costs. Thus, the Respondent did not propose by its premium allocation clause to reserve to itself "the manner, method, and means of providing medical . . . benefits during the term of the contract." *KSM*, 336 NLRB at 135. And it is this clause only that we look to in determining whether the Respondent ran afoul of the *McClatchy-KSM* rule.

[12] For this reason, we would find that *Courier-Journel*, 342 NLRB No. 113 (2004), cited by the dissent, is distinguishable. There, the Board stated that, while in bargaining an employer could propose a contract provision that gave it unlimited discretion, the employer could not implement such proposal upon impasse. Here, however, the provision does not vest complete discretion with the Respondent. Rather, the Respondent's own increases, as well as those of plan participants, are clearly delineated in the provision—the increases will be equal for all parties.

[13] In these circumstances, we thus find it unnecessary to reach the judge's finding that neither the past practice of the parties nor the Union's alleged waiver of rights permitted the Respondent's conduct.

Accordingly, we reverse the judge's findings with respect to the Respondent's conduct regarding Beneflex benefits, and dismiss this allegation.

ORDER

The Respondent, E.I. du Pont de Nemours & Company, Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employees, serving in their capacities as union representatives, access to the facility when they are attempting to investigate potential grievances.

(b) Threatening representatives of the Union with discipline for refusing to leave the facility when they are investigating potential grievances.

(c) Failing and refusing to provide relevant and necessary information to the Union regarding incentive programs and investigative notes.

(d) Failing and refusing to provide relevant and necessary information to the Union regarding the subcontracting of milling and finishing work.

(e) Refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit of employees set forth below, concerning the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed. The appropriate unit is:

> All production and maintenance employees at Respondent's Tonawanda, New York facility, including plant clericals, analysts and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

(f) Subcontracting the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract the milling and finishing work on Corian bowls.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore and resume the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to its facility in Tonawanda, New York, and offer those employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the employees whole for any loss of earnings and other benefits suffered from their date of layoff to date of proper offer of reinstatement, as set forth in the remedy section of the judge's decision.

(c) On request of the Union, grant access to the facility to employees serving in their capacities as union representatives, for a reasonable period of time, to allow them to investigate potential grievances.

(d) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, set forth above, concerning terms and conditions of employment including, but not limited to, the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed, and the decision to subcontract the milling and finishing work on Corian bowls, and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Provide the Union, to the extent that it has not already done so, with the relevant information it requested on September 28, 2000, regarding milling and finishing matters, on January 19, 2001, regarding incentive programs and investigative notes and on April 23, 2001, regarding the subcontracting of Corian milling and finishing work.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Tonawanda, New York, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees em-

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

ployed by the Respondent at any time since September 23, 2000.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 27, 2006

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

The majority's failure to hold the Respondent fully responsible for its attempts to divide and conquer the unit by bifurcating bargaining (over the Union's objections) and then by declaring impasse with respect to most issues effectively vindicates the Respondent's attempt to marginalize the Union. Similarly, the majority endorses the unlawful implementation of the Respondent's health insurance proposal, which grants the Respondent wide-ranging discretion to make ongoing changes in this area without further bargaining. I dissent from these aspects of the majority's decision.[1]

I.

The essential facts are not in dispute. The Respondent's employees have been organized for over 60 years. In 1977, the predecessor of the Union and the Respondent signed a collective-bargaining agreement containing an evergreen clause, which rolled over the contract annually absent a notice from either party to terminate or modify. Wages and benefits were thereafter renegotiated under this contractual provision on an ad hoc basis.

In 1993, the Respondent gave the Union notice of termination. In September 1994, the Respondent declared impasse and implemented its final offer. The Union filed charges with the Board, complaint issued, and in 1997 the Respondent entered into a settlement agreement requiring it to rescind the changes.

In 1995, before the settlement agreement was entered into, the Respondent returned milling and finishing work to the unit, which during the prior 10 years had been performed by subcontractors. The parties then entered into a side agreement on the finishing work which included a 120-day notice period for its termination.

In June 1999, the Union's predecessor merged with the Paper, Allied-Industrial, Chemical and Energy Workers, International Union (PACE). The Respondent continued to recognize the Union and meet with it in negotiations and in committee. In January 2001,[2] the Respondent delivered a final offer to the Union, including a supplemental agreement concerning the milling and finishing work. Plant Manager Doc Adams told union representatives that he expected that new technology would soon make the milling and finishing work unnecessary. In February, the Respondent provided notice of termination of the finishing work side agreement, effective June 29. The Union made an information request concerning this termination, much of which has never been provided. On March 19, the Respondent withdrew its offer concerning finishing work and said that it would not discuss it further in bargaining. The Respondent also announced that the milling positions would also be terminated by January 2002. The Union responded that it would "give that some thought."

In March, the Union delivered a proposal to eliminate certain bottlenecks in the finishing work, but the Respondent rejected it as being unnecessary due to the new technology that would soon be implemented. It represented that it would present an update at the next committee meeting, but that this would not be discussed at regular contract negotiations. The union representative protested, **"**this is part of contract [negotiations]**,"** and that job security was an issue. The Respondent answered that "you have our final offer."

On April 2, the Respondent issued a "corporate transformation plan," which announced that subcontracting of the milling and finishing work was being considered. The Respondent requested an Executive Board meeting for April 5. Although the Union insisted that milling and finishing work should be discussed in contract negotiations, it agreed to the meeting, which would be attended by the Union's contract negotiator. At the meeting, the Respondent announced that a feasibility plan showed that implementing the subcontracting proposal would save the Respondent $1 million annually, and that unless the

[1] I join the majority in finding that the Respondent violated Sec. 8(a)(5) of the Act by inadequately responding to the Union with respect to relevant and necessary information that it had requested, and by implementing its proposal to subcontract milling and finishing work. I also join the majority in adopting the judge's other findings concerning the Respondent's threat to a union official, its other refusals and delays in providing requested information to the Union, and its refusal to consider the Union's proposal to visit the Respondent's other facilities.

[2] All dates are 2001, unless otherwise indicated.

Union could come up with matching savings, it would implement the plan by June 29. The Respondent set an April 26 deadline for a response from the Union.

One week later, on April 12, before the Union had responded, the Respondent declared impasse on contract negotiations, and announced that it would implement its final offer on contract proposals on April 23. At an executive board meeting held on April 16, the Respondent further announced that it was moving the date to commence subcontracting from July to May 1, notwithstanding the pending April 26 due date for the Union's counteroffer on labor savings, as well as the fact that the notice period for the termination of the finishing work side agreement would not be fulfilled for another 60 days. The Respondent implemented its final offer on April 23 and commenced subcontracting the milling and finishing work on May 1.

II.

An employer's insistence on separating out mandatory subjects of bargaining from overall contract negotiations violates its duty to bargain in good faith. *E. I. du Pont & Co.*, 304 NLRB 792, 792 fn. 1 (1992). A unilateral imposition of piecemeal bargaining frustrates the purposes of the Act because it limits the range of possible compromises available to the parties, and prevents the parties from engaging in the kind of horse-trading over issues that is characteristic of good-faith negotiations. See *Trumball Memorial Hospital*, 288 NLRB 1429, 1446–1449 (1988). Of course, parties can mutually agree to engage in piecemeal bargaining, but any such waiver of the right to engage in full and complete bargaining must, like all waivers of rights under the Act, be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 707 (1983).

It is undisputed that the Respondent attempted to bifurcate bargaining in 2001 by separating out the issue of finishing and milling work. The majority finds that past practice indicates the Union's consent to bifurcated bargaining, relying particularly on the parties' use of piecemeal bargaining to deal with different issues during the term of the last collective-bargaining agreement. However, these examples of informal reopener negotiations on limited terms did not occur concurrently with overall negotiations for a new agreement, and they occurred with the Union's willing participation.[3] There is no evidence that the Union explicitly agreed to bargain separately about finishing and milling work at any time during negotiations in 2001. Its opposition to bifurcation was express and unequivocal. As detailed above, at a March 2001 bargaining session, the Union's representative protested the Respondent's refusal to discuss the finishing and milling work. By finding a waiver here nonetheless, the majority departs from the established standard for finding waiver. *Intermountain Rural Electric Assn.*, 305 NLRB 783, 786 (1991).

III.

Once the Respondent bifurcated bargaining, isolating negotiations for the finishing and milling work employees, it promptly declared an impasse in bargaining and implemented its last proposal. Contrary to the majority's view, the bifurcation of bargaining did taint the impasse, which was declared prematurely in any case.

The Respondent's handling of its finishing and milling work department necessarily had an impact on other bargaining within the unit. *E. I. du Pont & Co.*, supra. Removal of the finishing and milling work from bargaining robbed the Union of an important bargaining chip it could have used to resolve all of the remaining issues. This is precisely the type of result that was found to be unlawful in *Trumball Memorial Hospital*, supra. Moreover, the Respondent's demand that the Union come up with an alternative plan for achieving $1 million in cost savings in order to retain milling and finishing work in the unit necessarily required the Union to consider finding cost-saving concessions in other areas of its unitwide contract proposal.

But even without a finding that the bifurcation was unlawful, the evidence establishes that no actual impasse was reached. The majority finds that overall impasse had been reached, relying on the Respondent's declaration of impasse on three different occasions. I cannot agree. The record shows that the Respondent presented final offers three times: in September 1994, December 1998, and January 2001. In 1994, the Respondent implemented the terms of its offer, but rescinded these changes pursuant to an agreement settling unfair labor practice charges that the Union had filed. Following presentation of its "final" offers in 1998 and 2001, the Respondent continued to engage in bargaining with the Union. The Respondent's conduct establishes that its declarations of impasse were rhetorical, not real.

The majority relies on the Respondent's statements, while ignoring the actions of the parties. The Respon-

[3] The majority places undue reliance on the parties having negotiated a separate agreement in 1995 when the Respondent reacquired the milling and finishing work. At the time this agreement was reached, the parties were in litigation over allegations that the Respondent's earlier unilateral implementation of its overall contract proposals was lawful, which remained unresolved until a settlement agreement was reached in 1997. This bargaining history has little bearing on the parties' obligations in bargaining in 2001.

dent had only just challenged the Union to match its projected $1 million cost-savings program when it declared impasse, before the Union had time to prepare a response under the Respondent's stated deadline. At the time of the implementation of the Respondent's changes, the Union had not foreclosed the possibility for compromise in this area. It would therefore be logically impossible to conclude that the parties had reached their final positions in bargaining. *Bricklayers Locals 20, 22, 27, 48, 51, 55, 75, and 83 (Builders Institute of Worchester & Putnam Counties)*, 142 NLRB 126, 128 (1963). The Respondent's declaration of impasse and implementation of its latest "final" offer was unlawfully premature.

IV.

Even assuming that a lawful bargaining impasse had been reached on the Respondent's contract proposals, I would still find that the Respondent's unilateral imposition of its health insurance proposal violated Section 8(a)(5) and (1) of the Act. It is settled that an employer violates Section 8(a)(5) of the Act by insisting to impasse on and implementing contract provisions that reserve for the employer unfettered discretion to make changes to a mandatory subject of bargaining, because such actions are "inherently destructive of the fundamental principles of collective bargaining." *McClatchy Newspapers*, 321 NLRB 1386, 1391 (1996) (wages). See *KSM Industries*, 336 NLRB 133, 135 (2001) (health insurance).

The Respondent has unilaterally implemented a change to the health insurance program which provides that "projected increases (in deductibles) for future plan years will be shared equally between [the Respondent] and participants, provided, however, such increases may be allocated to premiums, components of plan design, or any combination thereof." The majority finds that this language is narrow and specific, and thus passes muster under *McClatchy*. I cannot agree. The clause does not specify which plan components may be subject to cost sharing, whether changes will apply only to new plan components or to existing components as well, or when changes can or will be made. The clause reserves for the Respondent the complete authority to resolve all these issues. This is precisely the kind of retention of broad authority that we found to be "inimical to the postimpasse, ongoing collective bargaining process" in *KSM*, supra.[4]

[4] This is not a case, then, like *Post-Tribune Co.*, 337 NLRB 1279 (2002), where allocation of health insurance premium increases was lawful because it was in accordance with its past practice of passing on such increases under a set formula. In contrast to this case, however, the employer there was not attempting to exercise or retain discretion over other aspects of the plan beyond the cost-sharing formula.

It cannot be argued that the prior agreement between the parties indicates the scope and limitations of the Respondent's discretion on implementing cost-sharing changes. Such prior agreements are irrelevant. In *McClatchy*, supra, the parties had also previously agreed to give the employer broad discretion in granting merit wage increases, but this history did not permit the employer to unilaterally implement its proposal for continued discretion following subsequent negotiations which resulted in lawful impasse. On the contrary, the Board held that an employer could retain discretion over changes in mandatory subjects of bargaining only if "definable objective procedures and criteria have been negotiated to agreement or to impasse." *McClatchy*, 321 NLRB at 1391. Those limitations are conspicuously absent here, and the Union certainly did not agree to cede broad discretion to the Respondent over further health insurance cost changes, whatever their previous agreements or discussions entailed.

In *Courier-Journal*, 342 NLRB No. 113 (2004), the Board held that where an employer unilaterally passed on increases in insurance premiums to employees in accordance with past practice and with the union's acquiescence, no violation occurred. The majority there made clear that if the union should object to impasse about the employer's retention of discretion over allocating the cost of premium increases, "the employer cannot implement its proposal, because it vests complete discretion in the Employer." Id. at 3. Here, the Union did object, so even apart from questions regarding past practice, the Respondent could not, under the majority's ruling in *Courier-Journal*, implement its proposal for being allowed to make discretionary changes.

Dated, Washington, D.C. February 27, 2006

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain collectively and in good faith with Paper, Allied-Industrial, Chemical and Energy Workers, International Union (PACE), and its Local 1-6992, as the exclusive collective-bargaining representative of the employees in the appropriate unit by refusing to bargain about the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed. The appropriate unit is:

All production and maintenance employees at our Tonawanda, New York, facility including plant clericals, analysts, and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally subcontract the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract that work.

WE WILL NOT deny employees, serving as union representatives, access to the facility when they are attempting to investigate potential grievances.

WE WILL NOT threaten representatives of the Union with discipline for refusing to leave the facility when they are investigating potential grievances.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union by failing to provide relevant and necessary information to the Union regarding incentive programs and investigative notes and the subcontracting of milling and finishing work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore and resume the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to our facility in Tonawanda, New York, and, within 14 days, offer those employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work immediate and full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make them whole for any loss of earnings and other benefits suffered, from their date of layoff to date of proper offer of reinstatement.

WE WILL, on request of the Union, grant access to the facility to employees serving as union representatives, for a reasonable period of time, to allow them to investigate potential grievances.

WE WILL, on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit set forth above, concerning terms and conditions of employment, including but not limited to, the Union's proposal to visit jobsites located outside the facility, where bargaining unit is being performed, and the decision to subcontract the milling and finishing work on Corian bowls, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL provide the Union, to the extent that we have not already done so, with the relevant information it requested on September 28, 2000, regarding milling and finishing matters, on January 19, 2001, regarding incentive programs and investigative notes and on April 23, 2001, regarding the subcontracting of milling and finishing work.

E.I. DU PONT DE NEMOURS & COMPANY

Doren G. Goldstone and *Arron B. Sukert, Esqs.*, for the General Counsel.

Steven W. Suflas, Esq. (Ballard Spahr Andrews & Ingersoll, LLP), of Voorhees, New Jersey, and *James D. Donathen, Esq. (Phillips, Lytle, Hitchcock, Blaine & Huber, LLP),* of Buffalo, New York, for the Respondent.

Kathleen A. Hostetler, Esq., of Denver, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Buffalo, New York, on 15 dates between February 11 and July 16, 2002. On charges[1] filed by the Paper, Allied-Industrial, Chemical and Energy Workers, International Union (PACE), and its Local 1-6992 (the Local, here after collectively referred to as the Union), the Regional Director for Region 3 of the National Labor Relations Board (the Board), issued a consolidated complaint and amended complaints[2] alleging that E.I. du Pont de Nemours & Company (the Respondent) committed violations of Section 8(a)(1) and (5) of the National Labor Re-

[1] The original charges were filed, and amended, as follows: Case 3–CA–22854 on December 28, 2000, and amended on March 19, April 9, June 21 and 26, July 17, and August 24, 2001; Case 3–CA–22957 on March 5, 2001, and amended on May 14; Case 3–CA–23066 on May 14, 2001, and amended on June 21 and July 17; Case 3–CA–23275 on September 13, 2001, and amended on November 9 and December 13, 2001.

[2] The original complaint was issued on August 30, 2001. Amended complaints were issued on November 16, 2001, and January 25, 2002. As fully set forth herein, counsel for the General Counsel withdrew a portion of par. IX(h) of the second amended consolidated complaint by letter dated October 10, 2002.

lations Act (the Act). The Respondent timely filed answers denying any violations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs[3] filed by counsel for the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures Tedlar Film and Corian products at its facility in Tonawanda, New York, where it annually purchases and receives goods valued in excess of $50,000, directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. BACKGROUND

A. Respondent's Business Operations

The Respondent's Tonawanda, New York facility also known as the "Yerkes" site, manufactures only two products, Tedlar and Corian. The Respondent divides its businesses into strategic business units (SBUs). Tedlar is part of the fluroproducts SBU and Corian is part of the solid surfaces SBU. Tedlar and Corian are produced in separate areas of the facility. Tedlar is a polyvinyl fluoride film used to laminate a variety of surfaces including aircraft interiors, home siding, and roofing. It has additional industrial applications, such as reducing corrosion on tractor-trailers and printed circuit boards. Corian is a trademark solid surface material used in kitchen, bath, and recreational applications. The Corian product is manufactured in two forms: Corian sheet, which is used for countertops and other flat surfaces, and Corian shapes, which are primarily sinks and bowls. Sheet is made by pouring, or casting, the Corian mix onto a stainless steel belt. Shapes, the sinks and bowls, are made by pouring the Corian mix inside a variety of molds. The molded shapes are then "milled" by mill operators, who are bargaining unit employees. The mill operators remove the flange, or outer edge, and drill drain holes in the shapes. After milling, the shapes are sanded or "finished." This operation is performed by employees classified as class 2 top finishers, using hand sanders to remove any blemish or unevenness from the shape. The milling and finishing work is done in the Corian closed mold casting (CCMC) department, where the sinks, bowls, and integrated tubs and bowls are manufactured.

B. Collective-Bargaining History Until January 12, 2001

The Respondent's employees have been represented by a labor union for over 60 years. The predecessor to PACE, the current labor organization, was the Buffalo Yerkes Union (BYU). During all relevant periods the appropriate bargaining unit (the unit) has been all production and maintenance employees at the facility, including plant clericals, analysis, and CCMC finishers. At the time of the hearing, there were approximately 400 unit employees represented by PACE.

In 1977, the Respondent and the BYU signed a collective-bargaining agreement containing an "evergreen" clause. This clause allowed the collective-bargaining agreement to remain in effect from year-to-year, unless either party gives notice to terminate, modify, or change the agreement. In accordance with the evergreen clause, since at least 1985, wages have been negotiated annually, at the request of one party or the other, in November. Benefits have been negotiated, on an ad hoc basis.

In September 1993, the Respondent notified the BYU that it was terminating the collective-bargaining agreement effective December 7, 1993. Although the parties engaged in negotiations for a successor agreement, none was reached and the Respondent declared impasse and implemented its final offer in September 1994. The final offer eliminated health maintenance organizations from the health plan, and "pyramiding," which required the Respondent to pay overtime for all hours worked over 40 in a week and 8 in a day.

In 1994, the BYU filed unfair labor practice charges regarding, among other things, the Respondent's implementation of its final offer. Bargaining was suspended while the charges were pending. After the Board issued a complaint the parties entered into an informal settlement agreement in February 1997. The agreement required the Respondent to rescind changes to the pyramiding of overtime, and to maintain the healthcare premiums at the 1996 level, until agreement or a good-faith impasse in bargaining was reached. The Respondent additionally paid each unit employee $1000, 60 percent of the overtime backpay owed, and reimbursed the unit employees 100 percent of the healthcare premium increases.

In 1995, between the time after the Respondent implemented its final offer, but before the settlement agreement was reached, the Respondent decided to return the shape finishing work to the facility. The finishing work had previously been performed at the facility from the introduction of the Corian shapes in the 1970s until 1985, when the work was moved to offsite subcontractors. Subcontractors did the work until 1995, when the Respondent began a dialogue with the BYU to return the finishing work to the facility because of quality control issues it had with the subcontractors. The Respondent told the BYU that a new, lower labor grade, had to be negotiated because the current, lowest grade, was not economically feasible. The BYU, in exchange for a lower wage rate for finishing work, gained steady employment. During this time the Respondent also stated its belief that technology eventually would eliminate the need for the milling and finishing of the shapes. The first CCMC finisher agreement (also called the class II agreement) was signed on August 4, 1995. The agreement creates a lower paying finishing position as well as setting a goal that at least 85 percent of the finishing work would be done onsite. After the first year either party could terminate the agreement with 120 days notice. The agreement is silent regarding milling work.

The parties resumed negotiations for a successor contract after signing the informal Board settlement agreement. In December 1998, the Respondent again presented a final offer that

[3] The Respondent and counsel for the General Counsel filed motions to correct the transcript. Counsel for the General Counsel's motion is granted except that the correction at Tr. 650 is at L. 6.

included a proposed CCMC finisher agreement. In February 1999, the unit employees voted to reject the 1998 final offer. The Respondent neither declared impasse nor implemented its final offer, but resumed negotiations with the BYU on March 3, 1999.

In June 1999, the BYU affiliated with PACE and was recognized by the Respondent as the unit employees collective-bargaining representative. Since then the parties have met in two forums, contract negotiations, and executive board (also called executive committee) meetings. At contract negotiations PACE International Representative James Briggs is the chief negotiator and spokesperson for the union negotiating committee. Area Human Resources Superintendent Anthony Casinelli represents the Respondent. Executive board meetings are convened at the call of either party, and generally deal with day-to-day issues. The same individuals represent the Union at the executive board and contract negotiation meetings, except for Briggs. The Respondent's representative is Area Employee Relations Superintendent Debbie Brauer, who may be accompanied by other respondent representatives depending on the issues to be discussed. Minutes are usually taken by the parties in both forums. Additionally, various, recurring, and mutually agreed upon, matters are referred to standing committees. For example, job descriptions and job rates, are referred to "job-ad" meetings, matters pertaining to the maintenance organization are dealt with in "maintenance upgrade" meetings.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Termination of the CCMC Finisher Agreement and its Declaration of Impasse

On January 12, 2001, the Respondent again gave the Union its final offer. Included in the offer was a supplemental agreement to the 1995 CCMC finisher agreement. The supplemental agreement provided for a gradual increase in the class II rate of pay for finishing employees. Although the agreement stated that it was important to retain an onsite finishing capability, it did not contain a percentage goal, as had the current agreement.

Notwithstanding the supplemental agreement, Doc Adams, the plant manager, admitted that the Respondent was contemplating closing, or significantly changing, the shape operation even as it submitted its final offer to the Union. As further evidence of this strategy, counsel for the General Counsel submitted a series of e-mails from high-level du Pont executives, located at the Respondent's corporate headquarters in Wilmington, Delaware, to Adams and Casinelli (GC Exh. 56).

The correspondence begins on January 8, 2001, when Vice President John C. Hodgson sent an e-mail entitled "Summary to Supervision–Contract Negotiations 1/3/01" to Harry Parker, vice president and general manager, du Pont services SBU, asking, "Are we negotiating this in a way that will allow us to shut down/change significantly the shape operation if we choose to?" Parker responded, "We're very sensitive to this and will not enter into any sort of negotiations that will impact this project." John Scott, global operations director/du Pont surfaces, forwarded a copy of Parker's e-mail to Adams and Casinelli, seeking their confirmation. On January 9, 2001, Casinelli wrote to Scott, "Harry's answer is correct and I will re-affirm this with Jim Donathen this morning when we meet on 'final offer' preparation." The "final offer" was that which was presented to the Union on January 12, 2001. Donathen is Respondent's local labor counsel, who also represented the Respondent at the hearing.

The project referenced by Scott relates to efforts to decrease manufacturing costs of the shape SBU, by developing new technology that would eliminate the need for milling and finishing work on Corian bowls. On January 26, Plant Manager Adams met with the Union and told them that the demand for shape SBU products was soft and that the manufacturing process must be improved. He announced a goal of reducing shape manufacturing costs by one-third. He told the Union that the Respondent was also exploring three different technologies for the production of Corian bowls that would require fewer finishing and milling employees. (R. Exh. 40.) His final point was a reaffirmation of the Respondent's statement made when the milling and finishing work was returned to the facility in 1995, i.e., that the technology would eventually advance to the stage that manually milling and finishing of the bowls would not be required.

On February 28, the Respondent terminated the 1995 CCMC finisher agreement effective June 29, 2001. The Respondent's notice to the Union attributes the need to terminate the agreement to business conditions necessitating the acceleration of its "efforts to implement new technology to improve the Shape Casting process and eliminate the need for Finishing the bowls following casting" (GC Exh. 21). Casinelli met with the union executive board on February 28. Local Union President Gary Guralny credibly testified that Casinelli told the union executive board that the process to eliminate the need for milling and finishing would be in place in 12 to 18 months. There was no mention of subcontracting of the milling and finishing work during the interim period.

Guralny testified that the Respondent's sudden announcement of its intention to terminate the CCMC finisher agreement raised a number of concerns and questions for the Union. The foremost concern was for the job security for the employees who performed the finishing work. The Union believed that the necessary technology could not be developed and implemented before the termination of the agreement. This belief was premised on the fact that although the Respondent had predicted the eventual existence of this technology, since at least 1995, it was only a month before that the Respondent had told the Union that it was just beginning to attempt to develop the technology. The Union also realized that with the termination of the agreement the Respondent would lose the benefit of the special, reduced wage rate, for finishing work and the employees would lose the work retention protection, thereby allowing the Respondent to subcontract all the finishing work. In an attempt to ascertain the Respondent's plans, and to alleviate its own concerns, the Union presented an information request to Employee Relations Superintendent Debbie Brauer on March 6, 2001 (GC Exh. 22). The request asked for information concerning the impact that the termination of the CCMC finisher agreement would have on the milling and finishing work.

The Respondent withdrew its CCMC finisher proposal from its final offer during the March 19 contract negotiation session.

The Respondent announced that CCMC proposals would not be discussed at contract negotiation meetings. The Union requested an explanation and the Respondent explained that because there was no proposal on the bargaining table concerning finishing, there was nothing to discuss. The Respondent further claimed that the "rest of the issues of discussion have to do with day to day operations." These other issues related to union questions regarding removal of the milling and finishing equipment from the facility and the number of affected employees. The Respondent also stated that in January it anticipated that the milling positions would also be eliminated. The Union stated, "[T]hey would give that some thought." (GC Exh. 52.)

In an effort to continue discussing the CCMC issues at contract negotiations, the Union prepared a proposal to alleviate a bottleneck in the finishing process that the Respondent had previously identified. This proposal was presented to the Respondent at the March 23, 2001 contract negotiation session. Casinelli, the Respondent's spokesperson, rejected the proposal contending that it made no sense because the Respondent did not expect any future need for finishing work after the implementation of the new technology. Briggs, the union spokesperson, asked what would happen if the technology did not work. Casinelli said that a team was "looking at that." Briggs asked to talk with the team "at our next meeting." Casinelli said that he had told the union executive board that they would receive an update, but that there would be no update "at contract." Briggs said, "This is part of contract. If you tell us there will be no lost jobs it may not be an issue. If you can say that on 6–29–01 no bowls will be finished or milled then OK. Until then we need an agreement to assure that this work won't go off–site." Casinelli replied, "From a negotiation perspective, you have our final offer. CCMC staffing we'll discuss. Having that team come to contract is not necessary."

On April 2, du Pont corporate headquarters announced a corporate transformation plan, which included a restructuring in some business areas. The stated objective was to improve competitiveness. Plant Manager Adams conveyed the announcement, by memo, to all employees. Adams added that the need to improve the competitiveness of the shape business was of being focused upon at the facility. In that regard, he wrote that teams were working to improve the technology, and that a feasibility study was underway to determine if subcontracting the milling and finishing work would provide a business advantage while transitioning to the improved technology (GC Exh. 28). Although Adams not only knew about the transformation plan a month before the announcement, and had taken action to have the facility participate in it, he was not at liberty to share his knowledge. The first notification that the Union received regarding either the transformation plan or the feasibility study was during this April 2 meeting. Adams admitted that the feasibility study was part of the "positioning," to take part in the transformation plan, as was the notice to terminate the CCMC finisher agreement.

An executive board meeting had been previously scheduled, at the Respondent's request, for April 5. Although the Union maintained that all CCMC issues should be addressed in contract negotiations, it was clear that the subcontracting of all the milling and finishing work would have a severe impact on the unit employees. Because of the importance of the issue the union negotiating committee decided that it had to go forward. In keeping with that decision International Representative Briggs attended the April 5 executive board meeting.

At the meeting, Brauer, the Respondent's spokesperson, told the Union that the feasibility study, which it had announced only 3 days earlier, was completed and showed that subcontracting the milling and finishing work would save $1 million in a 12-month period. The Respondent proposed that unless the Union could offer a comparable plan, all the milling and finishing work would be subcontracted by June 29, 2001, and all of the class 2 finishers as well as the milling operators would no longer perform those jobs. Regarding those employees, the Respondent proposed granting them severance benefits under its corporatewide career transition plan but only if the Union agreed to that plan by April 26. The Respondent justified this self-imposed deadline by explaining that if the "transition" costs were incurred during the second quarter of 2001, they would be charged at the corporate level, not the local site.

Also during this meeting, Brauer stated that as a result of the subcontracting plans, a new position called "material handler" needed to be created. She said that the parties would talk about this position at a separate forum. The Union protested that its committee would address the issue—not another committee, in yet another forum (presumably the "job-ad" committee).

Only a week later, on April 12, the Respondent, while still negotiating its subcontracting decision, declared impasse in the successor contract negotiations and stated that it would implement its final offer on April 23. During an April 16 executive board meeting, the Respondent announced that it had moved up the date for subcontracting the milling work from July 1 to May 1, 2001, thereby leaving the Union with only approximately 15 days to formulate a plan saving the Respondent $1 million over a 12-month time period using only labor costs. On April 23, 2001, the Respondent implemented its April 12 final offer.

1. Positions of the parties

On October 10, 2002, counsel for the General Counsel sent a letter to me, with copies to the parties, correcting the pleadings. Counsel for the General Counsel wrote, in part:

> [c]contrary to [(paragraph IX(h) of the Second Amended Consolidated Complaint, GC Exh. 1(mm)] as it now appears in the complaint Counsel for the General Counsel does **not** contend that Respondent's April 12, 2001, declaration of Impasse was tainted by [two allegations of failing to provide information]. Accordingly, Counsel for the General Counsel seeks to withdraw that portion of the complaint. . . . Paragraph IX(h) would thus now read as follows:
>
> > (h) On or about April 12, 2001, Respondent prematurely declared an impasse in bargaining for a successor agreement and announced it would implement its final offer on April, 23, 2001, notwithstanding its failure to reach a good faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls described above in paragraphs IX(d) and (e).

Accordingly, counsel for the General Counsel's theory of this portion of the case is that the Respondent committed a serious unfair labor practice when it unlawfully fragmented the CCMC and subcontracting issues from the overall contract negotiations. Because a lawful impasse can not coexist with a serious, unremedied, unfair labor practice, the Respondent's April 12 declaration of impasse was tainted and the April 23 implementation of the its final offer, as well as the its unilateral decision to subcontract the milling and finishing work, was unlawful.

The Union's brief generally supports counsel for the General Counsel's position in all aspects. Where it is inconsistent, such as in this section, it has been ignored (see, e.g., U. Br. at 6, 75). It is well established that the General Counsel's theory of the case is controlling, and the Union can not enlarge upon or change that theory. *D&F Industries,* 339 NLRB 618, 621 fn. 15 (2003).

The Respondent contends that the bifurcating of the milling and finishing subcontracting issue was consistent with the past practice and that the Union "readily acquiesced" (R. Br. 33). Respondent argues that the "impasse is barred **only** if the General Counsel demonstrates a casual connection between the unfair labor practice and the subsequent deadlock" (R. Br. 28–29). The casual connection cannot be made because the parties lawful bifurcation of the negotiations did not "'increase friction at the contact table.'" (R. Br. 29.) Thus, in the Respondent's view because the Union's acquiesced in the decision to discuss the issues separately, counsel for the General Counsel's theory is fatally defective (R. Br . 41).

2. Discussion and analysis

Counsel for the General Counsel submits that the subcontracting of milling and finishing work is a mandatory subject of bargaining under the Act. During the hearing the Respondent contended that there was no obligation to bargain because a large part of the savings had nothing to do with labor and benefit costs (Tr. 1308). That argument appears to have been abandoned by the Respondent in its brief. Regardless, it is well established that the decision to subcontract and transfer work outside the bargaining unit is a mandatory subject of bargaining. *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 (1964); and *First National Maintenance Corp. v. NLRB,* 452 U.S. 666 (1981).

Equally well established is that an employer violates its statutory duty to bargain in good faith about mandatory subjects of bargaining when it reduces the range of possible compromises by rigidly and unreasonably fragmenting negotiations. *Trunbull Memorial Hospital,* 288 NLRB 1429, 1446–1447 (1988), or where the employer has a fixed determination to implement its proposals regardless of the status of negotiations. *Howard Electrical & Mechanical,* 293 NLRB 472, 476 (1989). Counsel for the General Counsel relies on *E. I. du Pont & Co.,* 304 NLRB 792 (1991), [hereafter *du Pont (Spruance)* because it involved the Respondent's Spruance plant, located in Amphill, Virginia], as representing the foregoing principles.

du Pont (Spruance) involves a strikingly similar fact pattern. There the employer insisted that two of its proposals, one concerning a "site service operator," and the other pertaining to "technical assistants," although mandatory subjects of bargaining, were not part of the negotiations for the collective-bargaining agreement. There, as here, the employer also alleged a claim of urgency. Although the parties in *du Pont (Spruance)* strenuously maintained their positions, the employer did negotiate over the site proposal at the same sessions where contact proposals were discussed. It was not until a critical juncture in the bargaining process, when the employer refused to consider a proposed compromise between the two proposals, that the administrative law judge found that the employer had approached the bargaining table with a fixed determination to implement its proposals regardless of the status of negotiations. Id. at 802.

In the instant case, there is sufficient evidence to reach the same conclusion. In early January 2001, there are communications between high-level corporate officers, requesting assurances that negotiations will allow the Respondent to shut down or change significantly the shape operation. Casinelli confirmed that the Respondent would not enter into negotiations that would impact "this" project. Although Plant Manager Adams stated that "this" project involved the development of new technologies, the communications raise the specter that new technology would have a major impact on those employees working in the shape operation. This would certainly be true should the technology achieve the level that the Respondent had long anticipated—removing the need for milling and finishing operators. At the very least, when the Respondent submitted its final offer on January 12, 2001, an offer that contained a CCMC agreement, it was determined not to enter into any negotiations regarding the shape operation that would in anyway limit its ability to shut down or change significantly the shape operation in the future. The Respondent's determination to not limit its options was reinforced when Adams learned of the corporate-wide restructuring plan in early February 2001 (Tr. 1049). Adams immediately began to position the facility in order to participate in the plan, should he decide to so. One advantage to participating in the plan was that certain employee severance costs would be charged to the corporate headquarters, rather than the facility. In anticipation of participating in the restructuring plan, Adams told Casinelli to announce, on February 28, the Respondent's intention to terminate the CCMC agreement in 120 days. There remained outstanding, however, the January 12 final offer that contained a proposed CCMC agreement. It was imperative that the Respondent withdraw that proposal, and keep the milling and finishing issues out of contract bargaining. Adopting this strategy would enable the Respondent to negotiate the subcontracting of the milling and finishing work, should it decide to do so, comply with the corporate restructuring timetable, declare impasse on April 12 in overall contract bargaining, and implement its final offer on April 23. Based on the foregoing I agree with counsel for the General Counsel's contention that the Respondent demonstrated a "fixed determination" to implement its final offer in contract bargaining while still maintaining the flexibility to achieve an advantageous decision in bargaining over a major subcontracting issue.

It is also apparent that in *du Pont (Spruance),* supra, there was an outright refusal to consider the union's proposed com-

promise. The Board's explicit finding, however, leaves no doubt as to the basis for the violation:

> In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing its . . . proposal, we emphasize the Respondent's course of fragmented bargaining. The Respondent insisted throughout the course of negotiations that its . . . proposals were not part of the negotiations for the collective-bargaining agreement. It is [sic] also insisted that these proposals be separate from each other. It is well settled that the statutory purpose of requiring good-faith bargaining would be frustrated if parties were permitted, or indeed required, to engage in piecemeal bargaining. See *Sacramento Union*, 291 NLRB 552, 556 fn. 17 (1988), and cases cited there. What we find unlawful in the Respondent's conduct was its adamant insistence throughout the entire course of negotiations that its . . . proposals were not part of the overall contract negotiations and, therefore, had to be bargained about totally separately . . . from all the other collective-bargaining agreement proposals. We find this evinced fragmented bargaining in contravention of the Respondent's duty to bargain in good faith. [304 NLRB 792 fn. 1.]

The Respondent does not specifically address *du Pont (Spruance)*. Perhaps this is because it contends, contrary to the situation in *du Pont (Spruance)*, that "the Union willingly acquiesced in the Company's position that milling and finishing subcontracting should be addressed in separate negotiations; and the Union did so in order to get on with the bargaining of this important subject, rather than 'quibble' about the forum." (R. Br. at 31.)

The Respondent's contention is based in part on the parties' past practice of negotiating issues unrelated to contract language, independent of contract bargaining. As one example the Respondent cites the first CCMC finisher agreement (also called the class II agreement), which was signed on August 4, 1995. Counsel for the General Counsel argues, correctly, that that the parties may, and did, mutually agree to discuss issues away from the contract bargaining table. Counsel for the General Counsel contends that there was no agreement, implied or otherwise, regarding fragmenting negotiations for a current CCMC finisher agreement, or the subcontracting issues related to the milling and finishing work. Even had the Union previously acquiesced, that does not act as a waiver for all time. *Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013, 1017 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983). The CCMC Finisher agreement was part of the Respondent's two final contract offers. The Respondent cannot unilaterally refuse to discuss the CCMC finisher agreement, and the subcontracting issue, in isolation from the other contract issues, merely because it terminated the current CCMC finisher agreement and withdrew its proposed CCMC finisher agreement from its last final contract offer.

Counsel for the General Counsel submits that there is a presumption that the Union had not abandoned its right to good-faith bargaining, which includes the absence of fragmented bargaining. *Pertec Computer Corp.*, 284 NLRB 810, 817 (1987); *du Pont (Spruance)*, supra. A "clear and unmistakable waiver" is necessary in order to rebut the presumption. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 798 (1983). Although a union's waiver of a statutory right may be implied from the parties' past practice, such a waiver is not lightly inferred by the Board. See, e.g., *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). "Further, when relying on a claim of waiver of a statutory right, the employer bears the burden of proving that a clear relinquishment of that right has occurred." *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 104 (1996), citing *NLRB v. Challenge-Cook Bros. of Ohio*, 843 F.2d 230, 233 (6th Cir. 1988). To the extent that the Respondent is attempting to meet its burden by arguing that the Union never made a written objection to the Respondent's fragmentation of the bargaining subjects (R. Br. 34), it has failed to met its burden. The Respondent also contends that "each party made a conscious and knowing decision to bifurcate the subcontracting negotiations from the bargaining at the main contract table" (R. Br. 37). To test the accuracy of that contention the negotiation minutes and the related testimony must be reviewed.

a. The contract bargaining meeting of March 19, 2001

The complaint alleges that on March 19, 2001, the Respondent refused to bargain over the milling and finishing work as part of collective-bargaining negotiations for a successor agreement and insisted that this issue be discussed in separate negotiations. The Respondent's notes from the March 19 contract bargaining meeting are General Counsel's Exhibit 52 (R. Exh. 46, which was withdrawn, is the same document; Tr. 1324). The Union's notes are General Counsel's Exhibit 53. The parties do not argue that the notes are inconsistent, but, the Respondent's notes appear more thorough and I have relied more heavily on them. They state, in relevant part, that because the Respondent had given the Union the 120-day notice of intent to terminate the CCMC agreement, the Respondent was now withdrawing its proposed CCMC agreement from its final offer. Any information requests relative to CCMC would be handled outside of contract bargaining. In response to the Union's statement that it could still make an offer, the Respondent replied, "[T]hey did not say that they would not bargain." The Union asked why the Respondent withdrew the CCMC proposal. The Respondent said that it expected that the improved technology would eliminate the need for milling and finishing work by January. In response to additional questions about the milling and finishing work the Respondent said that the process "will be talked about outside of contract bargaining negotiations." That the Respondent "would be willing to talk outside of contract about it. That [the] whole discussion belongs outside of contract bargaining."

In response to a union question as to why CCMC was not being discussed at contract bargaining, the Respondent stated that "there is no proposal on the able, so it is not being discussed during contract." "The rest of the issues of discussion have to do with day to day operations" (GC Exh. 52). International Representative James Briggs, the chief negotiator and spokesperson for the Union negotiating committee, replied that "they would give that some thought."

The Respondent's minutes of the March 19 meeting disclose that the Respondent made it clear, on several occasions, that any discussion relative to CCMC, including responding to information requests, would only take place outside of contract talks (GC Exh. 52). It is equally apparent that when Briggs stated that the Union "would give that some thought" that the Union had not agreed with the Respondent's position. Briggs credibly testified that one of the items he wanted to think about was the Respondent's last statement on the matter, indicating that the Respondent took the position that it did because "there is no proposal on the table, so it was not being discussed during contract." Any possible inconsistency was resolved during the March 23 meeting.

b. The contract bargaining meeting of March 23, 2001

The Union, correctly as the evidence shows, did not believe that the Respondent's technology would be sufficiently advanced to remove the need for milling and finishing work before the expiration of the CCMC agreement. Based on this belief, during the March 23 contract negotiations meeting, the Union presented its CCMC "helping hands" proposal. Although the proposal was intended to alleviate a bottleneck in the finishing process, it had an additional, even more important purpose—to keep the CCMC issues on the contract negotiations bargaining table (Tr. 802).

Casinelli rejected the CCMC "helping hands" proposal. By rejecting that proposal the Respondent rejected even the remotest possibility (that became a reality) that the new technology, technology that the Respondent had heralded years before, would not be available before the expiration of the CCMC agreement. Casinelli also refused to allow the team developing the technology to talk with the union contract negotiators. Briggs insisted that the issue was part of the contract talks. He argued, prophetically, that an agreement was needed to assure that the work would not go off-site (GC Exh. 27). Casinelli maintained that the Union had the final offer, that he would only discuss CCMC staffing, and that it was unnecessary for the technology team to attend the contract negotiations. Briggs said he was shocked by Casinelli's response. Any possible ambiguity that the Respondent had fragmented the bargaining subjects was removed at this meeting. Not only is it clear that the Respondent insisted on fragmenting the collective-bargaining negotiations, but it did so without any reference, express or implied, that its pronouncement was consistent with an "Evergreen contract," past practice, or any prior agreement.

c. Respondent's April 2 announcement and the April 5 executive board meeting

On April 2, Adams announced the corporate transformation plan to the facility. He also announced that the Respondent was conducting a feasibility study to determine if subcontracting the milling and finishing work would provide a business advantage while transitioning to the improved technology (GC Exh. 28). Although this was news to the Union, Adams was aware of the transformation plan about a month before this announcement. He also admitted that the notice terminating the CCMC agreement, the withdrawal of the CCMC proposal, and the initiation of the feasibility study, were all part of the Respondent's efforts to position itself to participate in the transformation plan.

International Representative Briggs was asked by the union executive board to attend its April 5 meeting with the Respondent. Briggs had previously only participated in contract negotiations, where he was the spokesperson. Local Union President Guralny testified that Briggs was asked to attend because importance of the CCMC issue. Although the union negotiation committee believed that the issue should be discussed in contract negotiations, it "wanted to do something as fast as we could," and thus decided that they were not "going to fight with management" over the forum (Tr. 506).

The Respondent announced at this meeting that its feasibility study showed that subcontracting the milling and finishing work would save $1 million over 12–8 months. The Respondent additionally declared that unless the Union offered a plan with comparable savings, all the milling and finishing work would be subcontracted by June 29 (this date was later changed to July 1). The initial estimate was that the subcontracting would result in a permanent lost of 53 jobs. The Respondent proposed that those employees who lost their jobs could qualify for benefits under the corporate severance plan. This plan was called the career transition plan and its benefits were more generous than the severance plan at the facility. The Respondent alleged that for the transition costs to be absorbed at the corporate level they had to be incurred during the second quarter of 2001, thus the Union had only until April 26 to accept the career transition plan. (GC Exh. 30.)

It was also at this meeting that Debbie Brauer, the Respondent's employee relations superintendent, and its spokesperson at the executive board meetings said, "[w]e'll talk at a separate forum about a new position called material handler" (GC Exh. 30). This new position was necessary because of the Respondent's plans to subcontract the milling and finishing work. Guralny testified that he objected to the Respondent dictating that bargaining be conducted in yet another forum (Tr. 512–516). This position, and the salary for the position, was negotiated at executive board meetings at some point after the Respondent implemented its final offer (Tr. 832).

d. The April 12 and 16 executive board meetings

On April 12, the Respondent, while still negotiating the subcontracting decision, declared impasse in the contract negotiations, and announced that it would implement its final offer on April 23. The Union disputed the impasse, both at the meeting, and in a letter (R. Exh. 33), but to no avail. The Respondent implemented its final contract offer on April 23.

At the April 16 executive board meeting Brauer stated that the Respondent had moved the start date for the subcontracting of the milling work from July 1, 2001, as previously announced, to May 1. This left the Union with only 15 days to prepare a proposal that would save the Respondent $1 million, but without being permitted to engage in the normal—indeed required—give and take of the collective-bargaining process regarding the remaining issues on the bargaining table.

In presenting events of April 16, counsel for the General Counsel offered General Counsel's Exhibit 38B as the union minutes of that meeting. The last entry of that exhibit contains

the following dialog between Briggs and Brauer. Briggs: "Can't respond by tomorrow—we should have talked about subcontracting in contact bargaining." Brauer: "That's done—we already implemented terms of contract—7:00—9:30 tomorrow." As counsel for the General Counsel began his questioning regarding this exhibit, it became apparent that there was another version of the union minutes of that meeting. In that version, General Counsel's Exhibit 38A, the last entry has Briggs saying, "Can't respond by tomorrow" and Brauer responding, "7:00—9:30 tomorrow."

Guralny, who attended the meeting, corroborated Briggs' testimony that General Counsel's Exhibit 38B was accurate. Briggs further testified that he had seen General Counsel's Exhibit 38A in the Union office 6 to 8 weeks after the meeting. Briggs instructed the union secretary to correct those minutes to comport with his, Briggs', recollection. His version is General Counsel's Exhibit 38B. Brauer credibly denied making the statement concerning implementation contained in General Counsel's Exhibit 38B. The Respondent's minutes of the meeting corroborate her testimony (R. Exh. 16). I find Brauer's recollection, supported by the Respondent's minutes, to be more reliable than the recollections of Guralny and Briggs, as memorialized in General Counsel's Exhibit 38B. I reject, however, the Respondent's conclusion that the testimony of Guralny and Briggs should be totally discredited, and the complaint dismissed, based on my finding that Brauer's recollection is more reliable.

e. Events after the Respondent's April 23 implementation of its final offer

On April 30, the Respondent sent the Union a letter outlining the actions it was taking to implement its final offer (GC Exh. 40), notified the Union that on June 30, 53 positions at the facility would be eliminated (GC Exh. 41), and sent another letter to the Union stating that in the absence of a union proposal to save the Respondent $1 million, subcontracting of the milling and finishing work would begin on May 1 (GC Exh. 42). On May 1, the Respondent declared an impasse in bargaining over the milling and finishing work and implemented its subcontracting (GC Exh. 43). At this point, there had been approximately 10 meetings concerning the subcontracting of the milling and finishing work. After impasse was declared there were 16 executive board bargaining meetings over the effects of the subcontracting decision. Although employees worked in the CCMC department after July 1, all milling and finishing work was sent offsite to subcontractors.

f. Conclusions

Except as previously noted the bargaining sessions concerning the subcontracting of the milling and finishing work were conducted in executive board meetings and attended by the union negotiating committee. I have rejected the Respondent's contention that the absence of a written protest by the Union regarding the Respondent's unilateral fragmentation of the bargaining issues is evidence that the Union agreed, or waived its right, to bargain about all mandatory subjects of bargaining in a single forum. I also do not find that the attendance of the union negotiating committee at the executive board meetings is sufficient to demonstrate that the Union acquiesced to the Respondent's unilateral fragmentation of the bargaining issues.

The Respondent's unilateral fragmentation of the bargaining issues, in conjunction with its self-imposed deadlines, put the Union in the unenviable position of being stuck between the proverbial "rock and a hard place." The Union reasonably decided that it could better serve its members by using the limited time available to assess the validity of the Respondent's feasibility study, and try to construct a merged proposal of contract and the subcontracting issues. The subcontracting issue was of primary importance to the Union. The Union's goal was to convince the Respondent not to subcontract the work, or to at least minimize the amount of work that was subcontracted. In order to have the slightest chance of accomplishing either goal the Union had to meet with the Respondent under the conditions imposed by the Respondent. As set forth above, the Union did protest the fragmentation of the bargaining issues, and each time it was rebuffed by the Respondent. There was nothing more the Union could do, and in any case, the burden of proving waiver remains with the Respondent. *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 104 (1996).

I also do not attribute any significance to the testimony of Briggs and Guralny indicating that eventually the Union intended to submit a merged proposal containing both contract and subcontracting issues. The Union always viewed the CCMC issues as part of contact negotiations. Even after the Respondent announced that it was terminating the CCMC agreement, and withdrew its CCMC proposal from its final offer, the Union offered a "helping hands" proposal in contract negotiations. Once the Respondent provided the Union with its feasibility study it was readily apparent that a saving of $1 million, an amount equal to about 3 percent of the economic package that was on the contact bargaining table, could not be attained solely by reducing the labor cost attributable to the milling and finishing employees. I find that the Union's intent to submit a merged proposal was—like its attendance at the executive board meetings—a consequence of the Respondent's unilateral action. The origin of the Union's intentions and actions was necessity, not acquiescence.

The Respondent also contends that it would entertain any union proposals at either table. I am uncertain as to the specific conduct that statement entails, but I have no doubt that it does not encompass bargaining in good faith. If it did, the Respondent would not have unilaterally fragmented the subcontracting issues at the outset. The Respondent consistently exhibited a "fixed determination" to implement its final offer in contract bargaining while maintaining the flexibility to achieve an advantageous decision in bargaining over a major subcontracting issue. It could not achieve this objective and allow the CCMC/subcontracting issue to remain part of contract bargaining. Moreover, to place the onus on the Union for failing to present a merged bargaining proposal, under the circumstances of this case, is essentially requiring the Union to remedy the Respondent's unfair labor practice.

The milling and finishing issues were part of the parties contract negotiations. The Respondent's initial final contract offer included the CCMC finisher agreement, which was a result of those contract negotiations. Additionally, the Respondent's

final contract offer contained terms and conditions of employment for those milling employees who were not covered by the CCMC finisher agreement. The Respondent failed to bargain in good faith when, on March 19, 2001, it rigidly and unreasonably fragmented the negotiations by refusing to discuss finishing work in contract negotiations. The Respondent repeated this conduct when it unilaterally insisted fragmenting the negotiations for the subcontracting of the milling and finishing work. The Respondent, by its unilateral action, deprived the Union of engaging in "horse trading" or "give and take" bargaining that characterizes good faith bargaining. *E. I. du Pont & Co.*, 304 NLRB 792 (1991); *Sacramento Union*, 291 NLRB 552, 556 (1988).

The waiver of a statutory right—here the Union's right to bargain milling and finishing issues along with all other contract bargaining issues—is not lightly inferred by Board. The waiver must be "clear and unmistakable." *King Soopers, Inc.*, 340 NLRB 628 (2003) (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)). The waiver of a statutory right may be implied by reviewing a variety of factors, including the parties' bargaining history, past practice, or both. The party asserting that the waiver of a statutory right has occurred, has the burden of proving a clear relinquishment of that right. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349 (2003). The Respondent has not met its burden. Accordingly, I find that the Respondent refused to bargain over milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement, and insisted on bargaining over milling and finishing in separate negotiations, by this conduct the Respondent violated Section 8(a)(1) and (5) of the Act.

The Effect of the Unfair Labor Practice on the Impasse

In the absence of a lawful good-faith impasse, an employer may not unilaterally implement its final offer. A lawful good-faith impasse cannot be reached in the presence of unremedied unfair labor practices that affect the negotiations, and, thus, taint the asserted impasse. E.g., *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001), and cases cited. The remaining question is, did the Respondent's insistence that the CCMC issues be negotiated separately from the other bargaining issues, affect the negotiations to such a degree as to taint the impasse. I find, for the reasons set forth below, that there is a causal connection between the Respondent's fragmentation of the bargaining subjects and the overall contract negotiations.

The Respondent's claim of impasse is based on the parties failure to resolve two major issues, one concerning health care, and the other overtime pay. To the extent that this representation is an accurate picture of the status of negotiations before the Respondent's fragmentation of the bargaining subjects, I agree. The Respondent wanted to institute a self-insured managed health care plan. This proposal not only lowered the cost of employee health care, but passed on a larger share of the remaining costs to the employees. The Respondent's overtime proposal was to eliminate the contractual double overtime "pyramid" provisions whereby the employees receive premium pay for all hours worked over 40 in a week, and 8 in a day. Both issues presumably involve significant economic concessions for the employees, and economic gains for the Respondent.

As set forth above, on March 19, 2001, the Respondent modified its final last offer by withdrawing its CCMC proposal regarding the finishing work and declaring that any discussion regarding the "whole process" belongs "outside of contract bargaining." This action, coupled with the Respondent's previous announcement that the existing CCMC agreement would be terminated, was a matter of concern and confusion to the Union. It was of concern because the withdrawn CCMC proposal, although not specifying the percentage of the milling and finishing work remaining onsite, at least stated an intention to have the work remain onsite [GC Exh. 18(c)]. It was confusing because CCMC issues had always been part of contract negotiations. The Union was left pondering the Respondent's intentions regarding the milling and finishing work, rather than remaining focused on the items of longtime dispute. As the Board stated in a similar situation, the Respondent's unlawful conduct "diverted the Union's attention away from negotiations." *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002). In an attempt to ensure that the work would remain onsite, and to keep the CCMC issues as part of the contract negotiations, the Union developed the "helping hands" proposal. This proposal was developed, at least in part, as the result of the Respondent's unlawful fragmentation of the bargaining subjects. The wasted time and effort by the Union in developing the proposal, as well as the increased friction resulting from its summary rejection, had an adverse impact on the negotiations.

The greatest impact of the Respondent's unlawful fragmentation of the bargaining subjects, however, occurred after the Respondent announced that its feasibility study indicated that subcontracting the milling and finishing work would save $1 million. It then challenged the Union to offer a comparable plan, but at the same time refusing to allow the Union to juxtapose the alleged savings contained in the feasibility study, to any concessions that the Union might consider regarding contract issues. This unlawful fragmentation deprived the Union of "give and take" bargaining, which frequently results in the parties moving away from previously long held positions, in an attempt at comprise. Because of other conduct by the Respondent, explained below, it cannot be determined with certainty that compromise would have resulted. Considering, however, that the decision to subcontract had the potential to cause the largest layoff in at least 17 years, it is not beyond the realm of speculation that were it not for the Respondent's fragmentation of the bargaining subjects a comprise may well have been reached.

Based on the foregoing, I find that the Respondent's adamant insistence that the CCMC issues, including the subcontracting of the milling and finishing work, were not part of the overall contract negotiations, and had to be bargained about separately from the other contract proposals, is a serious unfair labor practice that contributed to the parties inability to reach agreement. A lawful good-faith impasse cannot be reached in the presence of a serious unremedied unfair labor practice that affects the negotiations. E.g., *Titan Tire Corp.*, supra.

Accordingly, I find that on April 12, 2001, when the Respondent prematurely declared an impasse in bargaining for a

successor agreement and announced it would implement its final offer on April 23, notwithstanding its failure to reach a good-faith impasse in bargaining regarding the subcontracting of the milling and finishing work on Corian bowls, the Respondent violated Section 8(a)(1) and (5) of the Act. It is also found that on April 23, 2001, when the Respondent unilaterally implemented terms and conditions of employment that were a part of its final offer, notwithstanding that the parties were not at a good-faith impasse in bargaining, the Respondent violated Section 8(a)(1) and (5) of the Act. The Respondent additionally violated Section 8(a)(1) and (5) of the Act when, on May 1, 2001, it commenced subcontracting milling work, and July 1, 2001, commenced subcontracting finishing work, on Corian bowls to Jaco and TFI.

B. The General Counsel's Alternative Argument

Counsel for the General Counsel argues in the alternative that, assuming the above conduct is lawful, the Respondent still violated the Act by implementing its decision to subcontract the milling and finishing work before reaching a valid good-faith impasse in bargaining over that issue. As evidence of the lack of a valid impasse, counsel for the General Counsel submits that the Respondent (1) failed to provide relevant information; (2) allowed insufficient time to review necessary information; and (3) imposed effects bargaining while decisional bargaining was ongoing.

1. The information request

The following allegation, which counsel for the General Counsel submits as support for his alternative theory, is also alleged as an independent violation of the Act, separate and apart of any impact that it may have on the alleged impasse. Paragraph VIII(d) of the complaint [GC Exh. 1(mm)] is the allegation at issue, and a copy of the April 23, 2001 information request is attached to the complaint as exhibit D. It is also Respondent's Exhibit 17.

The April 23 letter contains a few new information requests, but in large part it reiterates requests made on April 5 (GC Exh. 31) and 16 (R. Exh. 15). Counsel for the General Counsel submits that the Respondent failed to provide the following requested items contained in the April 23 information request [GC Exh. 1(mm) exh. D; R. Exh. 17)]: 4(e) actual, hard cost per hour for health, pension, and life benefits, and disability insurance; 4(k) [in the second paragraph of item 4] actual labor cost for supervision in the bowl finishing area; 5(b) the total number of bowls finished since 1997, listed by style number and color, and the location where the finishing was performed; 5(d) the actual rate of damage for finishing onsite and finishing by "JACO" [a subcontractor] for 1994 through 2000; 5(e) all subcontracts for milling and finishing work from 1994 to the present; 5(g) "JACO Custom Grinding" compensation for 1997 through 1999; and 5(h) copy of the subcontracting quote mentioned at the April 16, 2001 meeting.

a. Facts

There is no dispute that on April 2, 2001, the Respondent informed the Union that it was studying the feasibility of subcontracting the milling and finishing work of the Corian bowls and shapes. In response to "communications and announcements," dated April 2, 2001, the Union gave the Respondent an information request at the April 5 executive board meeting. The stated purpose of the request was to "properly evaluate DuPont's basis for its decision to outsource (the parties use 'outsource' as a synonym for 'subcontract') and/or eliminate the milling and finishing jobs." This information was "essential to the Union's ability to properly determine the extent to which labor costs are a factor in DuPont's decision." The Union also stated that because the Respondent claimed that the subcontracting would result in heightened competitiveness, and greater efficiency and productivity, the information that was potentially relevant to those issues had to be provided (GC Exh. 31). The three-page request primarily seeks information about the transformation plan and the feasibility study. It requests copies of the plan and the study, along with "copies of any studies or other documents . . . that discuss, compare or contrast total costs [and various other factors] between outsourcing workers and bargaining unit personnel" (GC Exh. 31, par. 4). After receiving the request, the Respondent reported that its feasibility study demonstrated that a savings of $1 million, over a 12-month period, would be achieved by subcontracting the work. The Union responded that it needed answers to the information request in order to bargain (Tr. 506).

The Respondent replied by letter dated April 10. The response included an attachment, what appears to be an excerpt of a draft document between the Respondent and an unidentified contractor dated April 3, 2001, and entitled "Scope of Work/Specification." (GC Exh. 34, attachment "Exh. A.") This excerpt may be in response to question 14, "Please provide copies of any guidelines that will be provided to outsourcers regarding the standards for finishing milling work." In response to paragraph 4 of the information request, set forth above, the letter indicates, "attached are detailed accounting reports that were prepared as part of the feasibility study." The "detailed accounting reports" are summaries.

During an April 16, meeting the Union replied, verbally and by letter, to the Respondent's April 10 response. The Union reiterated its request for the transformation plan, feasibility study, information related to claims of competitiveness, information regarding technology, and costs related to shape work performed in-house and subcontracted. The Union also specifically requested copies of all current subcontracts for milling and finishing work [R. Exh. 15, p. 2, item 5(a)]. In item 4(e) of its April 16 letter, the Union requests an explanation of how the operating labor and benefits figure was determined, and 1-year payroll records for class 2 operators; class 9 mill operators; quality employees; and inspectors [R. Exh. 15, p. 2, item 4, second pars. (a), (b), (e), and (g)]. During this meeting the Respondent gave the Union a 1997 service agreement between it and "JACO," a subcontractor. On April 20, the Respondent provided the Union with a written confirmation, dated April 18 of the responses provided to the Union on April 16 and 17 (R. Exh. 48).

On April 23, the Union gave the Respondent another information request, replying in part to the Respondent's April 18 response. This request continued to seek payroll records for class 2 operators, class 9 mill operators, quality employees, and inspectors. It also reiterated its request for an explanation of

how the Respondent arrived at the operating labor and benefits figure used in its feasibility study. In addition to a few new requests, the Union stated that the Respondent had not furnished information related to the transformation plan, restructuring of the business, and documentation concerning its assertion that it needed to improve competitiveness, that had been requested on April 15.

At the April 24 executive board meeting, which was attended by Doc Adams, the Union continued to ask why the 40-percent figure was used to calculate the cost of benefits in the feasibility study. The Union also continued to press for the actual payroll figures for the employees performing the milling and finishing work, rather than employee names and yearend earnings, which had been provided by the Respondent (R. Exh. 52).

On April 30, the Respondent, in addition to implementing its final contract offer, provided the Union with a written response to its April 23 information request (GC Exh. 42). The response states that the Union's April 23 request "does no more than rehash the previous information provided" and that the Respondent "does not know how information back to 1994 could be relevant to the union's proposals." The letter states that the Respondent has provided all of the information in detail that was used to formulate its "restructuring" proposal. That it has made experts available to explain the financial data, arranged for informational meetings, and provided the Union with an opportunity to question Adams about the transformational plan, even though the bargaining team had already responded to the Union's questions. Brauer also testified that the sentence stating that the Respondent "does not know how information back to 1994 could be relevant to the union's proposals" was a response indicating a lack of relevance to section 5(g) of the Union's April 23 information request asking for "JACO Custom Grinding" compensation for 1997 through 1999 (Tr. 1521; R. Exh.17).

Casinelli sent a letter to the Union, on October 26, 2001, stating that the National Labor Relations Board had contacted the Respondent concerning pending charges about the subcontracting and contract bargaining. Casinelli stated that although information requested in items 4(e) and (k), 5(b), (d), (e), (g), and (h), of the Union's April 23, 2001 information request, either had been provided to the Union, or was not relevant, the Respondent would provide the information, to the extent available, on November 3, 2001 (R. Exh. 18).

The Respondent's letter of November 2 provided the following (R. Exh. 19):

> 4(e): Individual benefit costs per hour are not tracked. The Respondent reiterated that benefits were calculated at 40-percent.
>
> 4(k): The feasibility study used an average of $104,000 for the 4 supervisors and 2 area supervisors in the Shape Area, for a total of $624,000. The actual costs for these 6 supervisors based on their income statements, plus the 40 percent benefit add-on was $655,511.28.
>
> 5(b): The Respondent stated that "during periodic Shape review meetings, we previously have advised the executive Committee which bowl types were sent to RAVE (a subcontractor) for finishing. Further, as you are aware, we schedule finishing location by type regardless of color." The Respondent contended that it did not have finishing data broken down by type prior to 2000, but provided a spreadsheet showing the requested information from January 2000 thorough June 2001.
>
> 5(d): The Respondent said that the information was only available back to March 2000. A spreadsheet showing the requested information from March 2000 through June 2001 was provided.
>
> 5(e): The Respondent noted that it had provided a copy of the 1997 subcontracts with RAVE for finishing and with TFI for milling and finishing. The Respondent said it would provide the balance of the documents available at the completion of a search.
>
> 5(g): The Respondent submits that subcontractor "JACO" grinds scrap Corian and does no milling and finishing work.
>
> 5(h): The Respondent states that the cost of subcontracting, based on the proposals obtained from RAVE and TFI, was set forth in the feasibility study provided to the Union on April 10. Attached were copies of the quotes from RAVE and TFI.

On November 13, 2001, the Union submitted the following response (R. Exh. 14): 4(e), the Union continued to request the supporting data upon which the 40-percent benefit cost figure was based. The Union explained that the Respondent had claimed that it was a self-insurer for life insurance and pension benefits, and the Union found that statement inconsistent with a 40-percent benefit cost add-on; 5(b), the Union denied receiving the requested information at shape review meetings, and it questioned the accuracy of contention that the Respondent did not have finishing data broken down by type before 2000; 5(d), the Union stated its belief that the Respondent had the requested information dating back before March 2000; 5(e), the Union stated that the Respondent had provided altered documents and an incomplete response; 5(g), the Union pointed out, contrary to the Respondent's previous answer to this question, that "Exhibit B," to the 1997 contract made reference to finishing work that was to be done by JACO; and 5(h); the Union stated that the request was for complete documents but that only quotes were provided. The Union also noted that the Respondent had abandoned its confidentiality claim as it pertained to this item.

b. Discussion

Counsel for the General Counsel contends that the April 23, 2001 information request, which is also paragraph VIII(d) of the complaint, and attached thereto as exhibit D, was critical to the Union because of the overriding importance of the subcontracting issue to the unit employees. It was imperative that the Union obtain the requested information in order to analyze and verify the accuracy of the feasibility study and the alleged savings, determine the effect of the subcontracting on the unit as a whole and its impact on the overall contact bargaining, and develop a comparable counterproposal.

(1) Section 4(e) of the April 23, 2001 information request

The summary of the feasibility study generally documents labor and benefit costs (R. Exh. 41). The Union's April 23 request was for the "actual hard costs," the supporting numbers, that were the basis for the summary. For example, during the subcontracting discussions the Respondent told the Union that a benefit rate of 40 percent was used for computations in the feasibility study. Casinelli testified that the 40-percent figure included vacation, disability, and, pension benefits, health care, and life insurance. The Union wanted to know what the estimated cost of each benefit. Casinelli further testified that it was possible to determine the dollar amount of pension benefits paid each year, as well as, the dollar amount of the medical bills paid on behalf of the individuals at the facility. In the same context, Casinelli stated that the benefit rate came from the corporate headquarters and was adjusted annually. Presumably, the rate is based on some calculation, yet the Respondent never attempted to provide the calculation, nor is there evidence that it attempted to obtain the requested information from its headquarters, the place of origin. In this instance, the failure to provide the underlying substantiation for the percentage was especially disturbing to the Union. The Union expressly told the Respondent that it doubted the accuracy of the 40-percent figure because the Respondent had previously said that it self-insured the life insurance and pensions funds.

The Union also informed the Respondent that it had evidence that the Respondent was paying less for power than the subcontractor and, thus, the Union was of the belief that the Respondent should have been able to perform the finishing work at a lower cost. Additionally, the Union thought that the feasibility study was incorrect because it used the same wage rate for the class 9 and class 10 employees.

(2) Section 4(k) of the April 23, 2001 information request

Instead of providing the actual supervisory labor costs in the first instance, as requested, the Respondent provided a "bundled cost for management." Thus, the summary contained in the feasibility study made it appear that an area supervisor and a low-level supervisor received salaries of $104,400 (R. Exh. 41). Although Brauer stated that she and Casinelli were concerned about providing individual salary information, it does not appear from the record that any claim of confidentially was made to the Union, and certainly none was made in the Respondent's written responses (R. Exhs. 42, 19).

(3) Section 5(b) of the April 23, 2001 information request

The Union was interested in the style, number and color of the finished bowls because of potential discrepancies between the comparative costs for subcontracting and onsite finishing, depending on the color and type of bowl being finished. Employee witnesses credibly testified that some bowl types require more time to finish than others. Obviously, the greater the amount of time required, the greater the cost. Nor was the Union privy to the bowl types that were being finished in-house under the 1995 CCMC finishers agreement for the time period before May 1, 2001. The Union was also aware that some employee finishers thought that the Respondent was retaining the more difficult finishing jobs in-house. The net effect of the above would be to skew the feasibility study to make it appear that the cost was greater to finish the bowls in-house.

(4) Section 5(d) of the April 23, 2001 information request

On April 16, the Respondent provided the Union with a service agreement between the Respondent and JACO. This agreement contained a loss-damage allowance provision. This provision made JACO liable for all loss, damage, or destruction that exceeded the allowance (R. Exh. 56, par. 16). The Union, aware that it was dissatisfaction with the quality that had caused the Respondent to return the finishing work to the facility, wanted to know the actual rate of damage. The Union wanted to compare the onsite to the offsite damage rates during a comparable time period. The Union was of the opinion that 1994 or 1995, when a substantial amount of finishing was being done offsite, would provide a comparable time period. If the damage rate was higher offsite than on, that would lower the cost of onsite finishing. Casinelli admitted that the Respondent did not provide the Union with the requested information during the April–May time frame, and Guralny credibly testified that the Union could not have obtained the damage rates elsewhere.

(5) Section 5(e) of the April 23, 2001 information request

The Union wanted the subcontracts for the milling and finishing work from 1994 to the present in order to track the cost increases over a period of time. Briggs testified that it was the Union's hope to combine future subcontracting cost increases, with the length of time it would take to fully develop the technology and that the subsequent diminution of the $1 million savings might be sufficient to convince the Respondent not to subcontract the work (Tr. 840). The Union received some, but not all, of the subcontracts.

The record also supports counsel for the General Counsel's contention that not all the documents given to the Union were complete. Brauer, testified that she gave the Union a copy of a contract with Essential Products (which became TFI) on April 27 (Tr. 1428; R. Exh. 57). This document was apparently provided to the Union a second time, as part of the November 2 response. Counsel for the General Counsel contends that Respondent's Exhibit 57 is only a portion of a procurement agreement. He contends, correctly, that General Counsel's Exhibit 65, which was obtained pursuant to a subpoena, is the complete agreement. Casinelli also admitted that the Respondent failed to provide the Union with a master services agreement dated March 1, 2001, between the Respondent and Rave, that applied to milling and finishing work, as well as, an April 19 contract order for finishing work based on the master services agreement (GC Exhs. 66, 67).

(6) Section 5(g) of the April 23, 2001 information request

The du Pont/Jaco service agreement (R. Exh. 56) contains exhibit B, Compensation. Exhibit B includes information about Jaco Custom Grinding Corp. and Rave, Inc. The Union's requests for the same information spanning a 3-year period was predicated on attempting to determine the long-term cost of subcontracting. The Respondent never provided the information claiming that it was irrelevant because Jaco did not perform milling and finishing work (R. Exh. 19) At the hearing,

Casinelli and Brauer testified that the agreement does relate to milling and finishing work (Tr. 1522, 1762).

(7) Section 5(h) of the April 23, 2001 information request

During subcontracting negotiations, Brauer said that the feasibility study was based, in part, on a vendor quote (Tr. 1354). She testified that she understood that the Union wanted the actual quote, and not simply the numbers contained in the feasibility study (Tr. 1523). Casinelli testified that the feasibility study contained a single number representing the cost of outsourcing. He admitted that he did not know the number of vendors submitting quotes, or the calculation used to arrive at the number representing the cost of the outsourcing (Tr. 1755–1756). Briggs credibly testified that the quote would help the Union in evaluating the validity of the feasibility study's alleged savings. He also testified that the Union had offered to sign a confidentiality statement to protect any property or proprietary concerns that the Respondent might have in releasing the vendor quote.

(8) The Respondent's arguments

The Respondent does not deny that it never provided the Union with the calculations upon which the 40-percent rollup benefit cost was based, as requested in item 4(e). It contends, rather, that the Union could have used its own computations for the purpose of formulating a bargaining proposal. In essence, the Respondent also admits that it failed to provide the Union with the actual labor cost for supervision, item 4(k), in a timely fashion. It argues that when the actual costs were supplied, they showed only that the Respondent underestimated its projections by $30,000. A relatively minor amount that could not have caused the impasse.

Regarding the actual quotes from the vendors requested in item 5(h), the Respondent maintains, without explanation, that the figure in the feasibility study is sufficient. It also contends that the Union was provided with the relevant sections of the underlying subcontracts that were requested in item 5(e). Finally, regarding items 5(b), (d), and (g), the Respondent contends that requested information is irrelevant to the impasse because those items did not deal with milling and finishing. Item 5(b) had no impact because the Union had done its own investigation and knew which bowls were being subcontracted, and in any case the Respondent intended to subcontract the milling and finishing work on all the bowls. The damage rates sought in item 5(d) were immaterial, because the vendor contract provided to the Union limited the Respondent's exposure to the cost of damaged product to a maximum of 3 percent, so the Union could have easily tested the Respondent's financial projections by using that factor. Regarding item 5(g), the Respondent again questions its relevance by asserting that the cost of the grinding work performed by Jaco had nothing to do with the feasibility study conclusion regarding the on savings to be achieved from subcontracting the milling and finishing work.

c. Analysis and conclusion

It is well settled that an employer, on request, must provide a union with information that is relevant to carrying out its statutory duties and responsibilities in representing employees. This duty to provide information includes information relevant to negotiations. Where the information sought pertains to employees in the unit, the information is deemed presumptively relevant and must be disclosed. Where the information concerns matters outside the bargaining unit the burden is on the union to demonstrate relevance. E.g., *Schrock Cabinet Co.*, 339 NLRB 182 (2003). The burden is satisfied when the union demonstrates a reasonable belief supported by objective evidence for requesting the information. The Board uses a broad, discovery-type standard in determining relevance in information requests. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. E.g., *LBT, Inc.*, 339 NLRB 504, 505 (2003); *CEC, Inc.*, 337 NLRB 516, 518 (2002), and cited cases. The burden to show relevance is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136,139 (1982), enfd. 715 F.2d. 473 (9th Cir. 1983).

An employer, absent a valid defense, must respond to the information request in a timely manner. An unreasonable delay in furnishing the information is as much a violation of the Act as is a refusal to furnish the information. E.g., *American Signature, Inc.*, 334 NLRB 880, 885 (2001). "With respect to any information that has now been provided to the Union, the remedy would be limited to a cease-and-desist order." E.g., *Made 4 Film, Inc.*, 337 NLRB 1152, 1159 (2002), citing *Postal Service*, 332 NLRB 635 fn. 2 (2000).

The relevancy of the requested information was established on April 2, 2001, when Plant Manager Doc Adams announced the corporate transformation plan, the stated objective of which was to improve competitiveness. Plant Manager Adams stated specifically that the focus was on the need to improve the competitiveness of the shape business. To this end he announced that there was an ongoing feasibility study to determine if subcontracting the milling and finishing work would provide a business advantage. He stated that he expected the elimination of some of the existing positions at the facility (GC Exh. 28). Immediately thereafter, the Respondent announced that based on its feasibility study, it could save $1 million by subcontracting the milling and finishing work. The Respondent then challenged the Union to develop a comparable proposal.

The Union would not be properly representing its members, and thereby not fulfilling its statutory responsibility, if it were to accept the Respondent's claim without being provided access to the substantiating documentation. Moreover, the Union is entitled to the baseline information in order to formulate its own proposals. Unverified summaries, produced by the Respondent's officials, are not sufficient for either purpose. E.g., *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788, 802 (2001), and cases cited therein; *Taylor Hospital*, 317 NLRB 991, 994 (1995).

Item 4(e) of the information request relates to the benefit costs of unit employees and as such is presumptively relevant. Counsel for the General Counsel has demonstrated that the remaining six items are necessary and relevant in order for the Union to either assess, or understand, the feasibility study, or formulate its own proposals. Accordingly, I conclude that the Union had a reasonable and objective factual basis for its information request of April 23 which is the subject of paragraph VIII(d) of the complaint, and attached thereto as exhibit D.

The Respondent specifically asserts that the information requested in item 5(b) is unnecessary because the Union has done its own "independent investigation," I find that the record does not support that assertion.

Item 5(b) is a requests the total number of bowls listed by style, number, and color finished since 1997 and the location were they were finished. The Union needed this information because of the potential discrepancies between the comparative costs for subcontracting and onsite finishing, depending on the color and type of bowl being finished. Employees witnesses credibly testified that different bowl types take longer to finish. Obviously, the greater the amount of time required, the greater the cost. Nor was the Union privy to the types of bowls that were being finished in-house under the 1995 CCMC finishers agreement for the time period before May 1, 2001. It also asserts that the information is irrelevant because it was the Respondent's intention to subcontract the milling and finishing work of all the bowls.

The Respondent's argument that this information was irrelevant because it was the Respondent's intention to subcontract all the bowls, regardless of style or color is off the mark. The Respondent claimed that by subcontracting the milling and finishing work it would save $1 million. The Union needed to test the validity of that contention. One method was to compare the costs of finishing the bowls under the previous subcontracts. The Union was told by the finishers, the employees who performed the work, that they believed that the Respondent was keeping the bowls that were more difficult to finish in-house. This belief was consistent with the Respondent's stated reason for returning the finishing work to the facility—poor quality control by the subcontractors. Because the finishing of the bowls is labor intensive, the longer it takes to finish a bowl, the greater the labor cost. Thus, in order for the comparison to be valid it was necessary to ensure that the style and color of the bowls being compared were similar.

Union President Guralny testified that he obtained the information about the Respondent retaining the more difficult finishing jobs by after talking with the finishers. In response to a question on cross-examination asking if the Union had conducted an "independent investigation" in order to try and obtain the requested information, he replied, "[Y]es". He then explained that the investigation consisted of him talking with the finishers. (Tr. 659–660.) It is evident that Guralny's discussions with some finishers formed part of the basis for the request, but his limited discussion with the finishers was not sufficient to satisfy the relevant information that was needed and requested.

Regarding the damage rates requested in item 5(d), the Respondent in brief opines that the rates are immaterial since the vendor contract limited the Respondent's exposure to the cost of damage to 3 percent. Assuming, for the sake of argument that this proposition has merit, I find no evidence that it was ever conveyed to the Union. Casinelli who, along with Brauer, was ultimately responsible for answering the information requests, testified only that he did not see the relevance to extending back 5 years. Although the Union explained that it needed to compare the onsite to the offsite damage rates during a comparable time period. It was of the belief that 1994 or 1995, when a substantial amount of finishing was being done offsite, would provide a comparable time period. Casinelli never offered his opinion as to what would be a comparable time period, nor did he explain his disagreement with the Union's time frame. Upon receiving the request, Casinelli testified that he did not even ask anyone the length of time for which the Respondent retained damage rates.

It was only later, in preparing the Respondent's November 2 response, that Casinelli reviewed the damage rates for approximately a 12-month period. Whatever information he may have provided at that time was of no use to the Union. The November 2 response can easily be characterized as "too little, too late." The time for good-faith bargaining had long passed, the work was subcontracted, the employees laid off, and the General Counsel was contemplating issuing a complaint. Even at that late date the Respondent still did not fully satisfy the information request. It was only in response to a subpoena that the complete subcontracting contracts were provided.

In this regard, the Respondent contends that, at least so far as the TFI contract is concerned (R. Exh. 57), the sections that were not provided were only "boilerplate contract clauses" and that the document that was provided was all that was in the contractor files at the facility. Casinelli testified that in obtaining the TFI contract to provide to the Union either he (Tr. 1827) or someone else (Tr. 1752) received the three-page document entitled "procurement agreement" (R. Exh. 57) from the facility's contract administrator. He further testified that he never asked the contract administrator if there were any other contracts that would be responsive to the Union's request. In his opinion, he gave them what he thought the Union was asking for (Tr. 1828–829), and all that it needed (Tr. 1864).

The Respondent admits that the requested documents are relevant (R. Br. 78). Once that fact is established it is the Respondent's duty to supply the documents as requested, in this case all the current subcontracts, or an explanation why the complete documents cannot be supplied. The Respondent's duty is not satisfied by supplying only those parts of relevant documents that it deems necessary. See *Good Life Beverage Co.,* 312 NLRB 1060, 1070 (1993).

It is not enough that the Respondent may have provided the Union with reams of information throughout the course of negotiations. The relevant information requested by the Union was essential for it to engage in meaningful bargaining. The request pertained to the precise issue over which the parties were bargaining, the business advantage of subcontracting the milling and finishing work. The Union made the Respondent well aware of the critical importance of this issue. The decision to subcontract the milling and finishing work had the potential to cause the largest layoff of unit employees in over 17 years. Consistent with the Union's expressed concern over the importance of the issue the Union began requesting relevant information immediately following the announcement of the Respondent's transformation plan.

Accordingly, I conclude that the Respondent violated Section 8(a)(1) and (5) by failing and refusing to furnish the information requested by the Union in its April 23, 2001 letter.

2. Alleged failure to allow sufficient time to review necessary information

A corollary to the duty to furnish relevant information, is that before a valid impasse is declared the recipient must have had adequate time to review and consider the information. *Royal Motor Sales*, 329 NLRB 760, 763 fn. 14 (1999). Counsel for the General Counsel contends that the Union did not have sufficient time to review, analyze and consider a considerable amount of information provided shortly before it declared impasse.

The Union was given the summary of the Respondent's feasibility study on April 10, 2001. The Union made a further information request on April 16. This request asked for payroll records for class 2 operators, class 9 mill operators, quality employees, and inspectors (R. Exh. 15, p. 2, item 4, par. 2 entitled "detailed accounting reports" for "*Labor*"). The Union intended to use this relevant and necessary information to ascertain the accuracy of the feasibility study, and to use it in formulating a counterproposal. The Respondent provided the information, which consisted of thousands of sheets of paper, on April 27, only a few days before its May 1 implementation of its subcontracting decision. "The delivery of the requested information was followed essentially without delay by the implementation of the final offer[]. Thus, it is impossible to determine if the information would in fact have been used by the Union to modify its position. This uncertainty must be resolved against [the] Respondent[] whose precipitous action[] created [the] uncertainty." *Dependable Maintenance Co.*, 274 NLRB 216, 219 (1985).

Both the Respondent's failure to provide relevant information and declaring impasse and implementing its changes "before the Union has a reasonable opportunity to review the relevant information provided to it . . . and to analyze the impact such information would have on any counteroffers it might make" are the same facts that were present in *Decker Coal*, 301 NLRB 729, 740 (1991), quoting *Storer Communications*, 294 NLRB 1056 (1989). In *Decker Coal*, Administrative Law Judge Pannier concluded:

> In sum, it cannot be said with any degree of certainty that negotiations would not have continued and would not have progressed to final agreement once the Union had been furnished with the requested information and allowed sufficient time to evaluate it. In the circumstances, a contrary conclusion would be speculative. Respondent has shown no compelling need to have made a last and final offer, and then to implement its terms, before the Union had been afforded those statutory rights. [Id. at 744.]

The Board has recently cited *Decker Coal* as an example of a case, as here, where the unfilled information request precludes a finding of impasse, as distinguished from cases unlike *Decker Coal*, where the unfilled information request has no relevance to the core issues separating the parties. Compare, *Decker Coal* with *Sierra Bullets, LLC.*, 340 NLRB 242 (2003).

3. Forcing the Union to engage in effects bargaining before completion of decision bargaining

This allegation, in addition, to being part of counsel for the General Counsel's alternate theory of the case, is also alleged in paragraphs IX(f) and (k) and XI, as an independent violation of the Act.

a. Facts

On April 2, 2001, the Respondent announced that it was reducing its global work force and closing less competitive manufacturing assets (GC Exh. 29). This announcement was apparently part of the transformation program Plant Manager Adams mentioned in his memo of the same day (GC Exh. 28). Adams testified that participation in the transformation plan was voluntary, that he knew about the plan a month before the announcement, and that he had begun "positioning" the facility in order to participate in the plan. As a result of the transformation plan the Respondent expected to take a one-time second quarter charge of about 4045 cents per share. It anticipated that about half of the charge would be for employee severance costs. The impact of this announcement on the local level was that any severance costs resulting from terminating employees, because of subcontracting the milling and finishing work, would be assumed at the corporate level as part of the overall global restructuring. The severance costs would only be assumed if the terminated employees were participating in the corporatewide career transition program (CTP). The unit employees had a separate severance plan, and the union membership had rejected the Respondent's final offer, in 1999, that contained the CTP.

Brauer proposed the corporatewide CTP to the Union during the same meeting, and on the same day, April 5, that she announced the Respondent's intention to layoff all class 2 finishers and the milling operators by June 29, 2001. Brauer believed that the CTP was more generous than the current unit severance plan. She told the Union that the CTP agreement had to be signed by April 26. Adams and Casinelli testified that the April 26 date was chosen to allow the facility to complete the administrative work necessary to comply with the May 1 deadline contained in the corporate transformation plan. Adams testified that the use of the CTP plan would have saved the facility $200,000.

Briggs testified that the Union's priority was always to save jobs by convincing the Respondent not to subcontract the milling and finishing work. With that as a goal, it had hoped that there would be no decision and hence no need to bargain over effects. Briggs testified about the difficulty of addressing the CTP issue, as well as obtaining information necessary to verify the feasibility study and formulate its own bargaining proposal, all by a May 1 deadline.

The membership had previously rejected a final offer that contained the CTP. The Union had reservations about the CTP because the Respondent retained a significant amount of discretion regarding the circumstances under which the benefits contained in the plan would be applicable. Brauer confirmed that the Respondent retained a certain amount of discretion under the CTP. Notwithstanding the Union's reservations concerning the CTP, it believed that the plan would benefit those employ-

ees laid off as a result of the subcontracting. Apparently this belief was because the Respondent was guaranteeing that the benefits would apply under the current circumstances. On April 6, the Union proposed a one-time only application of the CTP to those unit employees laid off as a result of the subcontracting of the milling and finishing work (Tr. 529–531).

On April 11, the proposal was rejected by the Respondent. The Respondent insisted that the CTP must apply to all unit employees. The Respondent, once again, told the Union that its proposal had to be accepted by April 26. No further discussions regarding CTP were held, and on May 1 the Respondent declared impasse, and began subcontracting the milling work.

b. Analysis and conclusion

It is undisputed that the subcontracting decision at issue, is a mandatory subject of "decision" bargaining. It is also well settled that severance pay is a mandatory subject of "effects" bargaining, and that the Respondent has a "duty to bargain 'in a meaningful manner at a meaningful time' with the Union that represents its employees over the effects of the [decision]." *Stevens International, Inc.*, 337 NLRB 143, 150 (2001), quoting *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981).

Counsel for the General Counsel submits that it is well established that in cases of plant closings a union's obligation to request effects bargaining, and, thus, avoid waiver of that right, is triggered only by a clear announcement that a firm decision has been made which affects the employees' terms and conditions of employment; an "inchoate and imprecise announcement of future plans," which stresses that no decision has yet been made is insufficient to trigger the obligation. *Sierra International Trucks, Inc.*, 319 NLRB 948, 950 (1995), quoting *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994). From this principle counsel for the General Counsel derives that because effects bargaining is triggered by the finality of the decision, it is not meaningful to discuss effects bargaining before decision bargaining has been completed, or a good-faith impasse has been reached. As evidence that bargaining on effects should occur after the decision bargaining has been completed counsel for the General Counsel cites *Dan Dee West Virginia Corp.*, 180 NLRB 534 (1970), where the Board adopted an administrative law judge's finding that bargaining over effects "was premature until the matter of the change (the decision to change to a distributorship) was resolved or an impasse reached on it." 180 NLRB at 539.

The Respondent argues that the April 26 deadline was not artificial, but was based on legitimate business justifications associated with the corporate transformation plan. The Respondent also contends that 3 weeks was sufficient time for the Union to choose between the benefit plans, both of which were well known to the Union.

Counsel to the General Counsel's argument has an appealing logical progression to it. It also requires, in effect, that a per se violation be found whenever an employer offers a proposal concerning the effects of a decision before completion of bargaining over the decision, and that I am unwilling to do. Nor am I persuaded that *Dan Dee West Virginia Corp*., supra, requires such a result. The quote provides some support for counsel for the General Counsel's position. I do not, however, find it dispositive of the issue, nor does counsel for the General Counsel contend that it is so. The case has never been cited for the quoted proposition, in fact, my research does not show that the case has ever been cited. The issue concerns the employer's failure to bargain over the decision. The complete sentence seems to be an attempt to justify the union's avoidance of effects bargaining. The sentence states, "It may be true that the Union avoided bargaining about the effects of the change, but bargaining on that subject was premature until the matter of the change was resolved or an *impasse (*emphasis in the original) reached on it. Accordingly, I find *Dan Dee West Virginia* distinguishable, or at least, sui generis, and I conclude that the Respondent did not violate the Act when it made an offer concerning the effects of the decision to subcontract the milling and finishing work, before completion of the bargaining over the decision to subcontract.

I also find that, under the circumstances of this case, bargaining over the issue of the two severance plans for 3 weeks is not evidence of bad-faith bargaining over the effects. The parties did bargain. The Respondent made a proposal, the Union presented a counterproposal, the counterproposal was rejected, but the Respondent continued to offer its original proposal. Accordingly, I do not find that the Respondent violated the Act when it made an offer concerning the effects of the decision to subcontract the milling and finishing work, before completion of the bargaining over the decision to subcontract and when it set a deadline for conclusion of bargaining over a severance plan for those employees who would be displaced as a result of the subcontracting of milling and finishing work on Corian bowls.

Counsel for the General Counsel also argues that by "informing the Union that it could not bargain over an effects issue, it effectively deprived the Union of an opportunity to bargain in good faith over effects in violation of Section 8(a)(1) and (5) of the Act." The complaint alleges that the Respondent failed to bargain in good faith over the effects from April to July 2001. I have found that the Respondent's proposal concerning the CTP, set forth above, is not evidence of bad-faith bargaining. The parties stipulated that the Union and the Respondent met for 15 sessions between May 3 through July 24 and that those sessions dealt primarily with effects bargaining. There is no other evidence concerning bargaining over the effects. Accordingly, I recommend dismissing those allegations in the complaint that allege bad-faith bargaining over the effects of the decision to subcontract, specifically paragraphs IX(f), (j), (k), and (q), and XI.

4. Conclusion

I agree with counsel for the General Counsel's alternative theory for the reasons set forth above. I find there was no good faith impasse on May 1, when the Respondent announced impasse, and began subcontracting the milling and finishing work. At the time of its announced impasse and implementation, the Respondent had failed to provide relevant information to the Union, and failed to allow the Union sufficient time to review necessary information. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act when, on May 1,

2001, it commenced subcontracting milling work, and on July 1, 2001, commenced subcontracting finishing work, on Corian bowls, to JACO and TFI.

C. Additional Information Request Allegations

Paragraphs VIII(a) and (f), and XI of the complaint allege that the Respondent unlawfully delayed providing a response to the Union regarding a September 28, 2000 information request until March 12, 2001. The information request is attached to the complaint as exhibit A. Paragraphs VIII(b) and (g), and XI allege that on January 19, 2001, the Respondent failed to provide information to the Union pertaining to employee gifts and incentives. The information request is attached to the complaint as exhibit B. Paragraphs VIII(c) and (h), and XI allege that on January 19, 2001, the Respondent failed to provide information to the Union regarding a disciplinary investigation. The information request is attached to the complaint as exhibit C. All the foregoing sections of the complaint allege violations of Section 8(a)(1) and (5) of the Act.

1. The September 28 request

a. Facts

On September 28, 2000, the Respondent informed the Union that the milling operators would be assigned a 15-shift schedule, as opposed to the 20-shift schedule. The Respondent told the Union that the fourth shift of milling operators would be incorporated into the three remaining shifts. The anticipate result, based on a time study, would be enhanced efficiency, especially during lunch and break periods. It would also result in the loss of Saturday and Sunday work.

Also on September 28, Union President Guralny gave Area Employee Relations Superintendent Debbie Brauer the information request at issue (complaint exhibit A; GC Exh. 16). The request sought, among other items, the total number of "as cast" bowls for 3 years, staffing levels of class 2 finishers for 5 years, sanding stations per shift, bowls being cast, milled, and sanded per week, as well as, whether Essential Products or TFI subcontractors, were finishing and milling bowls. The request was based on the Union's concern that the Respondent was subcontracting work, at time when the facility was not operating at full capacity. The Respondent had explained that there was a bottleneck occurring in the milling operation. Because the bowls could only be finished after being milled the bottleneck in milling was impacting the amount of bowls that could be finished. The Respondent claimed that its mills were working at full capacity, but that subcontracting was also necessary.

About 3 weeks after the request Guralny asked Brauer its status. Brauer indicated that Dennis Wertz, who is involved with the CCMC production process, was handling the request. Wertz was unavailable that day, but a few days later he told Guralny that because of the lengthy time period requested there was "a lot to pull together," but that he would respond once he "had it together." Twice more Guralny asked Wertz about the request and both times he said he was still "pulling it together." In November 2000, the Respondent began the 15-shift schedule (Tr. 709).

In response to the announcement that the Respondent was canceling the CCMC finisher agreement, set forth above, the Union, on March 6, 2001, submitted a new information request. This request incorporated the September 28, 2000 request, and reminded the Respondent that the September 28 request "has still not been answered" (GC Exh. 22). Brauer testified that she did not recall why the September request was not answered but thought that "it might have slipped through the cracks." Guralny testified that the information sought in September was still relevant in March because the Respondent was seeking to implement new technologies that had the potential to eliminate the milling and finishing work. The Union was trying to reconcile the reduction in milling hours with the subcontracting of the milling work. In that regard the information requested in September could provide a standard for measuring milling operations. Brauer knew of this concern.

The information requested in September 2000 was not furnished to the Union until March 12, 2001, almost 6 months after the initial request. The Respondent never asked if the Union had lost interest in the information, nor did it question the Union's need for the information.

b. Analysis and discussion

Counsel for the General Counsel submits that those sections of the September 28, 2000 request dealing with bargaining unit work are presumptively relevant and the Union has demonstrated the relevance of those sections pertaining to unit work being performed offsite by subcontractors. E.g., *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1678 (2000), and cited cases. I agree, and the Respondent does not argue otherwise.

The Respondent does contend that after the shift change was implemented in November 2000, the request became moot. The Respondent also contends that both Brauer and Area Human Resources Superintendent Anthony Casinelli were busy with contract negotiations and other information requests and as such the delay in responding to the September request was at most a minor inconvenience to the Union.

I disagree that the union request became moot in November when the Respondent implemented the shift change. The right of a union to requested information is determined by the situation that existed at the time of the request. E.g., *Booth Newspapers, Inc.*, 331 NLRB 296, 300 (2000). Guralny testified that the request for information was based in part on the Union's concern that the mills were not operating 7 days a week and yet bowls were being sent offsite to be milled (Tr. 412–417). The information request states that the information is needed to "maintain job security" and item 3 of the request goes directly to the subcontracting issue.

Nor is the Respondent's contention that Brauer and Casinelli were very busy well founded. As the Board stated in *Allegheny Power*, 339 NLRB 585, 587 (2003):

> In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of

> the response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

Brauer testified only that she could not recall why the information was not provided in a timely fashion. Guralny testified that it was Wertz, not Brauer, who was gathering the information, and whenever Guralny asked him about it he only said that he was "still pulling it together." Guralny's testimony that the Respondent could easily retrieve the information from its computer records was not rebutted. The Respondent never claimed that gathering the information was unduly burdensome. Indeed, the Respondent indicates in its brief that the information was assembled and provided within 6 days of the second request. I conclude that the Respondent did not make a "reasonable good faith effort to respond to the request as promptly as circumstances allow."

Failing to provide relevant and necessary information in a timely manner, is as much a violation of the Act as is a refusal to provide information. E.g., *Booth*, supra at 300. Accordingly, I find that the Respondent unlawfully delayed providing a response to the Union regarding a September 28, 2000 information request until March 12, 2001, and thereby violated Section 8(a)(1) and (5) of the Act.

2. The January 19 request regarding gifts and incentives

a. Facts

Paragraphs VIII(b) and (g), and XI of the complaint allege that on January 19, 2001, the Respondent failed to provide information to the Union pertaining to gifts awarded to class II employees and details regarding an incentive program (complaint exh. B; GC Exh. 12). The incentive program itself is the subject of a complaint allegation that is addressed below.

The information request was initiated based on rumors Guralny had heard regarding product gift cards being awarded to unit employees for work performed and productivity levels achieved. He also sought to verify a claim that some employees had received offsite training to improve their efficiency at finishing work. It is undisputed that the Respondent did not provide the information within 10 days, nor did it respond in writing as to why the information was not provided, as the Union had asked in its request.

During the first week in February 2001, Guralny asked Brauer about the status of the information request. He testified that she said she was still working on it, but that her initial indication was that the gifts were not rewards for achieving a production standard, but only for recognition, similar to the "safety bucks" program. He also confirmed that she told him that "there wasn't any specific bowl count" associated with the awards (Tr. 297).

Brauer testified that Guralny told her that the Union's primary concern was about production quotas. She assured him that the awards fell within the current recognition program and that any production quota would be bargained. She also told him that if a shift group "had" 600 bowls they would get movie passes or gift certificates. She testified that she gave Guralny a "Gift Certificate Disbursement Report" covering March 2000 to March 2001, around March 2, 2001. I credit Brauer's recollection of the events (Tr. 1411–1415). Guralny was especially tentative—"I don't remember getting a printout. . . . I think I would recall something like that" when talking about the disbursement log (Tr. 295).

b. Analysis and discussion

As counsel for the General Counsel contends even with crediting Brauer's testimony, the Respondent never fully responded to the information request, e.g., the disbursement log does not even cover the requested time frame. The Respondent concedes as much, when it argues in brief, that it provided an "adequate response. . . . that allayed the Union's greatest concern." The Respondent does not deny the relevance of the requested information, nor does it offer any legitimate reason why the information has not been provided. Once the Respondent's duty to supply the documents is established, it must either provide them or provide a satisfactory explanation why the complete documents cannot be supplied. The Respondent's duty to provide the information is not satisfied by only providing information that it deems necessary. See *Good Life Beverage Co.*, 312 NLRB 1060, 1070 (1993).

Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

3. The January 19 request regarding a disciplinary investigation

a. Facts

Paragraphs VIII(c) and (h), and XI of the complaint allege that on January 19, 2001, the Respondent failed to provide information to the Union regarding a disciplinary investigation. The information request is attached to the complaint as exhibit C. The information request was predicated on a "people treatment incident" involving employee Chea Sharrett, a process operator on the Corian sheet line, and Supervisor Angelo Paradise. The information request sought "all notes and documentation" related to the incident investigation. Brauer provided a summary of the investigation, claiming confidentiality, and the fact that Paradise is not a union member.

Sharrett alleged that Paradise pushed her out of the way to obtain access to a control panel. The Union had filed numerous grievances regarding Paradise's harassment towards unit employees, and it filed yet another on Sharrett's behalf. In August and September 2000, Brauer interviewed the participants and several employee witnesses. Brauer creditably testified that Guralny was present for all the interviews except for that of one unit employee and Paradise. Sometime after the investigation Paradise was demoted and moved away from Sharrett. In response to the information request of January 19, 2001 (GC Exh. 44, and exh. C of the complaint), Brauer provided the Union with a single-page document entitled "summary" (GC Exh. 45).

Guralny testified that he was present during Brauer's interview with Sharrett and that the summary regarding that interview was not accurate. He also testified that the Union was concerned about the disparate application of the Respondent's "People Treatment" policy. He stated that under the policy unit employees had, after being investigated by "consultants . . . from Corporate Headquarters" been discharged or suspended. Paradise, in contrast, was apparently only the focus of a local

investigation, did not receive as severe a penalty as some unit employees, and yet, had been the subject of a number of grievances concerning harassment of people in the workplace. The Union wanted to compare the information that was on the "grapevine" with that contained in the notes (Tr. 711–712).

b. Analysis and discussion

Counsel for the General Counsel submits that there is a conflict regarding whether the Respondent had ever provided "raw investigation" notes to the Union. Brauer testified that providing actual notes of interviews did not conform to past practice. Casinelli corroborated her testimony, but he also admitted that in the past the Union had expressed its preference for the "raw investigation" notes. Guralny in response to the question "had you received these types of document summaries prior to this occasion" answered, "[N]o." I see no conflict. Guralny's denial that he had received document summaries before, does not establish that either he, or the Union, had ever received the actual notes from the investigation. He may never have received either. I do agree with counsel for the General Counsel's contention that the fact that the Union did not pursue the actual notes on previous occasions, does not constitute a "clear and unmistakable waiver" of statutory rights, e.g., *T.U. Electric*, 306 NLRB 654, 656 (1992), and the Respondent does not contend otherwise.

The Respondent does contend that the Union's complaint was that the Respondent did not terminate Paradise, and thus, the information is not presumptively relevant and that counsel for the General Counsel has not met his burden of showing that the information concerning a nonunit employee was material to the administration of the parties' contract.

In so far as the requested information pertains to employees in the bargaining unit, it is presumptively relevant. Where the information sought concerns a person outside the bargaining unit, here a supervisor, the Union bears the burden of establishing the relevance of the requested information. *Reiss Viking*, 312 NLRB 622, 625 (1993). In either situation the Board uses a broad, discovery-type standard. The Board does not pass on the merits of the underlying grievance; the Union is not required to demonstrate that the information sought is accurate, nonhearsay, or even ultimately reliable. E.g., *Postal Service*, 337 NLRB 820 (2002), and cases cited. The burden is not an exceptionally heavy one, even potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. See, e.g., *U. S. Testing Co.*, 324 NLRB 854, 859 (1997), enfd. 160 F.3d 14 (D.C. Cir. 1998), rehearing en banc denied (1999).

The Union's purpose in requesting the actual investigation notes was to evaluate whether there was disparate treatment of supervisors and bargaining unit employees with regard to the application of the Respondent's "People Treatment" policy. The requested information is relevant and necessary to that inquiry. E.g., *Postal Service*, 332 NLRB 635, 636 (2000).

The Supreme Court in *NLRB v. Detroit Edison Co.*, 440 U.S. 301 (1979), held that, in certain situations, confidentiality claims may justify a refusal to provide relevant information. In *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105–1106 (1991), the Board discussed and employer's obligation when raising a confidentiality assertion as follows: "[t]he party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not." The burden of proof requires "a more specific demonstration of a confidential interest in the particular information requested." *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984). Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation that will meet the needs of both parties. *National Steel Corp.*, 335 NLRB 747, 748 (2001), and cases cited. Here the Respondent not only made a blanket claim of confidentiality, but never made an offer of accommodation.

Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

D. Denying Union Representatives Access to Investigate Potential Grievances and Threatening Union Representatives with Unlawfully Discipline

Paragraphs VI(a) and (b) of the complaint, as amended at the hearing, allege that on September 23, 2000, Area Superintendent Rory Watson and Area Human Resources Superintendent Anthony Casinelli, unlawfully denied employees, in their capacity as union representatives, access to the facility where they sought to investigate potential grievances. Respondent, by Watson, also unlawfully threatened these employees with discipline it they failed to leave the facility.

1. Facts

The Tedlar building is located in the middle of the facility. It consists of a small office area in the front, a finishing area, a training area behind the finishing area, a loading dock, mix area, and a polymer area behind the mix area. In the mix area, the polymer is placed in bins, mixed with solvent, blended, and pumped into the casting area. Numerous unit employees work in the building. On September 23, no work was scheduled in the building but there was work being performed in the facility.

It is undisputed that on the morning of September 23 Al Moore, local union financial secretary, Jeff Houseman, local union recoding secretary, and Gary Guralny, local union president, entered the Tedlar building through the finishing area. Their visit was prompted by an "Employee Information Bulletin" stating that management was going train supervisors and other nonunit personnel to operate equipment usually operated by unit personnel, because of a strike authorization vote that was held in August. The bulletin claimed that the training was only for the purpose of strike planning. Guralny had also heard from Casinelli that no product would be produced. The union officials believed that it might be a contract violation if management operated the Tedlar casting line, which was unit work (GC Exh. 2, art. XII, sec. 3, p. 36). The Union wanted to get the facts of the matter and to verify the claim that product was not being produced.

Upon entering the building the union officials were stopped by Watson. Moore told him that they were investigating a possible grievance and/or NLRB charge. Watson replied that there was no need for them to be in the building because the Respondent had told the Union what was it was doing, and he asked them to leave. Moore replied that they felt that they needed to

see what the Respondent was doing in order to file a grievance. Watson said that if they did not leave they could be disciplined, up to and including, discharge. Houseman left, and Guralny told Watson that they were remaining. Watson said that he wanted them to understand that they might be disciplined if the did not leave, he then returned to his office. The men remained for a time and observed individuals being trained to use an overhead hoist. They eventually walked along the outside of the building. They could see very little because the doors were closed and the doors only had little "porthole" windows. They did notice an absence of steam emanating from a polymer vent, indicating that there could have been something happening in the production process. They walked as far as the maintenance shop because of their concern over a safety issue involving a large propane tank. As Guralny and Moore were returning to the union office, which is located at the facility, they met Casinelli. He also told them to leave and that the Respondent did not want them walking around the Tedlar area.

Guralny and Moore credibly testified that they had never been denied access, nor needed permission, to visit any area of the plant while investigating grievances at anytime.

2. Analysis and discussion

The parties agree that the balancing test for determining whether an employer can lawfully deny a union's request for access for informational purposes set out in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir.), is controlling precedent for this issue. *New Surfside Nursing Home*, 322 NLRB 531 fn. 2 (1996). That test requires accommodating two conflicting rights; the right of employees to be responsibly represented by a union, and the right of the employer to control its property and ensure that its operations are not interfered with. Thus, where it is shown that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access. *Holyoke*, supra at 1370. It is the employer's burden to establish "those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access." *New Surfside Nursing Home*, 322 NLRB at 535, citing *Hercules Inc.*, 281 NLRB 961 (1986).

In addition to the safety issue, the union sought access to gather information for a potential grievance, i.e., to ascertain if non-unit individuals were performing unit work and producing a saleable product. Although not dispositive of the issue, the information that the union sought to obtain by observing the process is presumptively relevant to, and necessary for, its role as the employees' collective-bargaining representative. *Holyoke*, supra at 1370.

The Respondent's primary response to this contention is that it had previously told the Union that supervisors would be operating production equipment, but would not be making salable product. The Respondent also offers that had the Union really believed that it was producing a salable product, rather than scrap, it could have asked to review readily available production records, but that the Union never made a request. "It cannot be said that a union would be fulfilling its statutory responsibility of policing a contract by blindly accepting a respondent's assertions as to . . . what the requested information would show." *Ormet Aluminum Mill Products*, 335 NLRB 788, 802 (2001). Nor does the Respondent's belated argument that the Union could have asked to review production records prepared by the Respondent satisfy its burden to establish "those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access." *New Surfside Nursing Home*, 322 NLRB at 535, citing *Hercules Inc.*, supra.

The Respondent concludes its argument by stating that "given legitimate safety, operational and managerial interests" the Respondent's right to control access to its premises must predominate. The evidence does not establish that these generalized concerns were made know to the Union. The evidence does establish that safety was a union concern. There is no evidence that the Union ever sought to interrupt, or interfere, in anyway with the Respondent's operation. Perhaps "managerial interests" is the Respondent's concern about union officials observing the ability of nonunit employees to operate the equipment. If that is the case, counsel for the General Counsel offers a solution. Once the union representatives were able to determine that the work product was being discarded, and that the operation did not pose a safety threat to unit members throughout the facility, access could have been curtailed. See *Holyoke*, supra at 1370 (limiting access to reasonable periods).

In conclusion I find that the Union's interest in observing the process is substantial and the Respondent's interest in denying the union officials access to the Tedlar area is insignificant. Accordingly, I find that the Respondent, by denying employees serving in their capacities as union officers access to the plant when they are attempting to investigate potential grievances, violated Section 8(a)(1) of the Act.

In determining whether an 8(a)(1) violation has occurred, the test is whether the employer's conduct reasonable tends to interfere with the free exercise of employee's Section 7 rights under the Act. Counsel for the General Counsel contends that Watson's statements to the union officials, threatening them with discipline if they did not leave the Tedlar area, reasonably tended to interfere with the Section 7 rights of employees serving in their capacity as union representatives. The statements are clearly threats, and were not denied by Watson when he testified. The Respondent, has not briefed this issue. Accordingly, I find that the Respondent threatened union representatives with discipline for refusing to leave the Tedlar area of its facility when they were attempting to investigate potential grievances, in violation of Section 8(a)(1) of the Act.

E. The Alleged Refusal to Bargain Over Visitation of Jobsites Where Bargaining Unit Work is Being Performed

1. Facts

Paragraph IX(c) of the complaint alleges that since on or about February 2, 2001, the Respondent has refused to bargain over the Union's visitation of jobsites located outside of the Respondent's facility where bargaining unit work is being performed. The record establishes that unit employees are assigned to perform production work at facilities owned by other entities. Thus, Guralny credibly testified that in early 2001 lab

analysts were sent to subcontractors JACO/Rave and Plas-Lok, for various production purposes. Also during that time period unit employees performed production work at an Excel warehouse in suburban Buffalo, New York.

Guralny testified that he had previously asked Brauer if he could visit JACO and Plas-Lok to investigate safety matters that had been raised by unit employees assigned to those facilities. He also wanted to see the working conditions that existed in the Excel warehouse. The parties had no procedure for dealing with offsite visits by union representatives. On February 2, 2001, he gave Brauer a written request for him and the Union's safety representative to visit the three locations (GC Exh. 20). Brauer said that she would determine the past practice and see what she could do. Guralny mentioned the request to Brauer on February 5, and she again said that would work on it. Guralny next raised the issue at a March 12 executive board meeting. The Respondent asked, "[W]hat specifically the Union was looking for" regarding visitation. Guralny responded that the Union wanted someone to report to the Union regarding the work being performed and the safety of the employees. This statement was consistent with the statement contained in the written request that was given to Brauer over a month before.

In April 2001, with still no visitation procedure in place, Guralny and Hanson went to Brauer and asked to visit Aglade, another offsite subcontractor. The union representatives had received notice that unit employees were being sent to Aglade and the Union wanted to go with them to assess the safety of the facility and the some new equipment. Brauer said that she would work on it. When the time approached for the employees to leave Brauer still had not responded to the union representative's request. Guralny and Hanson went to Brauer and told her that they were going to go unless she had some objection. Brauer accompanied them on the visit. This visit occurred after the charge was amended in Case 3–CA–22854 on March 17, 2001, to include the allegation concerning the Respondent's refusal to negotiate a visitation procedure (Tr. 448). At the hearing, Casinelli testified that the Respondent was in the process of setting up a visit to the Excel warehouse.

2. Analysis and discussion

Counsel for the General Counsel contends that bargaining over the right of union representatives to visit the offsite jobsites of subcontractors, where unit employees are performing bargaining unit work, is a mandatory subject of bargaining. Counsel for the General Counsel submits that a host of issues would be appropriate for bargaining, such as: the procedure the union representative would follow to obtain release from the Respondent's facility, the amount of time permitted for the offsite visit, the remuneration, if any, that the union representative would receive, and whether the representative would be accompanied by a management representative. Counsel for the General Counsel has not, however, cited any authority which explicitly declares such a proposal a mandatory subject of bargaining. Counsel for the General Counsel, instead, argues by analogy, that "just as union access to an employer's own facility, to fulfill the union's representational role, is a mandatory subject of bargaining, access to a subcontractor's facility to observe bargaining unit employees is also a mandatory subject."

In *Ford Motor Co. v. NLRB,* 441 U.S. 488 (1979), the Supreme Court upheld a Board finding that in-plant food prices and services are a mandatory subject of bargaining. In *E. I. du Pont & Co.*, 301 NLRB 155 (1991), the Board characterized the Court's decision as resting "primarily on the following considerations: (1) that the matter is of deep concern to workers; (2) that the matter is plainly germane to the working environment; and (3) that the matter is not among those managerial decisions which lie at the core of entrepreneurial control." See also *Verizon New York, Inc.*, 339 NLRB 30, 30–31 (2003).

Applying the foregoing criteria I find, in agreement with counsel for the General Counsel, that the matter is a mandatory subject of bargaining. The unit employees had expressed their concern about their offsite working environment to their union representatives. Nor does the subject matter intrude on managerial decisions which lie at the core of entrepreneurial control. The Respondent does not contend otherwise.

The Respondent instead paraphrases the complaint as "refusing Union requests to visit off-premises locations where bargaining unit work was allegedly being performed." Perhaps the initial union requests were unclear, but there can be no ambiguity after March 17, 2001, when the charge in Case 3–CA–22854 was amended to include the refusal to bargaining allegation. The substance of the Respondent's argument is that its failure to arrange a timely inspection of the Excel warehouse is at most de minimis. Refusal to bargain over a mandatory subject of bargaining is not de minimis, nor does the fact that the Union made one offsite visit satisfy the Respondent's duty to bargain in good faith over a mandatory subject of bargaining.

I conclude that the Respondent has refused to bargain over the Union's visitation of job sites located outside the Respondent's facility where bargaining unit employees are performing unit work, in violation of Section 8(a)(1) and (5) of the Act.

F. The Unilateral Changes to the Health Benefit Plan

Paragraphs IX(n), (o), and (p), and XI of the complaint allege that on or about October 1, 2001, the Respondent unilaterally implemented changes to the health benefit plan in effect for unit employees, including, but not limited to, changes to employee premiums, copays, deductibles and stop losses, prescription drug payments, health insurance options, and working spouse converge. These changes are alleged to be independent violations of the Act, and therefore are not dependent on the previous finding that the Respondent's declaration of impasse on April 12, 2001, and implementation of its final offer on April 23, 2001, were unlawful.

1. Facts

In 1991, the Respondent and the Union entered into a supplemental agreement that incorporated the Beneflex Flexible Benefits Plan (Beneflex) into the existing bargaining agreement. The supplemental agreement states, in relevant part:

> (Add as Article XIV, Section 3): "In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the COMPANY'S Beneflex Flexible Benefits Plan,

subject to all terms and conditions of said Plan." [GC Exh. 46B, par. 2.]

Beneflex is an employer sponsored, self-insured, benefit program with a number of components, including medical, dental, and vision care, life insurance, and a vacation "buy-back" program. In 1993, the employees were also covered by the Blue Cross/Blue Shield health care plan. The Beneflex Plan, which was adopted January 1, 1992, effective January 1, 1994, and amended on December 1, 1997, contains a "Modification or Termination of the Plan" provision in article XIII, that provides, in pertinent part:

> The company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year. Termination of this Plan or any benefit plan incorporated herein will not be effective until one year following the announcement of such change by the Company. [GC Exh. 46A, par. XIII.]

In October 1993, the Respondent proposed the elimination of all local insurance options, replacing them with a self-funded, managed-care Beneflex Plan. This Beneflex Plan would include an initial cost share of 80/20, with 80 percent being contributed by the Respondent and 20 percent by the employees, with the employees and the Respondent sharing the cost on a 50/50 basis after January 1, 1997. The parties were unable to reach agreement, and in September 1994, the Respondent implemented its final offer. The health care component of the implemented offer provided the Beneflex Medical Care Plan, and eliminated the other health care options, i.e., Blue Cross/Blue Shield and HMOs. Thus, all unit employees were now enrolled in the Beneflex Plan, with managed care and a new cost share.

In response to the implementation, the Union filed unfair labor practice charges alleging unlawful impasse. These charges were resolved when the parties entered into a Board informal settlement agreement on February 21, 1997 (GC Exh. 4). Under the agreement unit employees were "responsible for paying the 'employee share' of premiums at the 1996 levels until agreement or good faith impasse in bargaining is reached." The agreement also required that the Respondent "not unilaterally impose any future premium increases on the bargaining unit employees until agreement or good faith impasse is reached in bargaining." (GC Exh. 4, par. 5a.) As a result the unit employees paid a cost share with the premiums frozen at the 1996 level.

Area Human Resources Superintendent Anthony Casinelli, testified that it was the Respondent's position that the settlement agreement only required that the premium rate be frozen at the 1996 level, but that the other cost components of the Plan i.e., copays, deductibles, stop/losses, etc., were not frozen. He also acknowledged that the Union's position was that all costs were frozen at the 1996 level. Casinelli future testified that the Respondent paid more for the unit employees than nonunit employees, because of the frozen premiums. Casinelli said that from 1993 through 2001, about half of the employees' cost share was premium, and the other half was copay, deductible, and stop-lost amounts. Thus, the corporatewide cost sharing percentage could vary from an individual's cost sharing percentage based on the individual's use of the plan (Tr. 1561–562).

On January 12, 2001, the Respondent presented its final offer. The final offer retained the Beneflex Plan (GC Exh. 18A, art. XVI, sec. 2, p. 24), with the added option of coverage under a local HMO (GC Exh. 18A, art. XVIII, sec. 3, p. 27). The major change related to the premiums:

> Participants will pay for premiums, co-pays, co-insurance and deductibles established for a particular plan year. (The projected Du Pont participant cost share for year 2001, based on actuarial analysis, is 75/25.) Projected increases for future plan years will be shared equally between Du Pont and participants, provided, however, such increases may be allocated to premiums, components of plan design, or any combination thereof. [GC Exh. 18A, art. XVIII, sec. 1(A), p. 27.]

In essence, the premiums were defrosted and the increased cost would be phased in over the next 2 years.

In October 2001, the Respondent announced changes in the Beneflex Plan, effective January 2001. These included increases in premiums, copays, deductibles, stop/loss amounts, and the working spouse criteria. The changes also included new benefits, such as a prescription drug stop/lost, reduction in premiums for vision care, and increases in the maximum contribution for flexible spending accounts. In a letter dated October 22, 2001, the Union protested the changes, contending that the Union had not been notified of the changes, that the Respondent had an obligation to bargain in good faith over the changes and insisting that the Respondent rescind the announced changes and commence bargaining. The Union also commented that the management rights provision is without effect. (GC Exh. 49.) The Respondent, without responding to the letter, implemented the changes as planned.

Casinelli testified that through various companywide written forms of communications, as well as specific meetings with the Union, the Respondent repeatedly informed the Union about the annual changes to the Beneflex plan. The Respondent adjusted the unit employee's copays, deductibles, and stop losses, from the time of the 1997 settlement agreement until April 2001, when the Respondent declared impasse. Casinelli also testified that the Union did not protest any of the previous changes in the Beneflex plan, and that the 2002 changes were consistent with the settlement agreement and the Respondent's final offer.

2. Analysis and discussion

Health insurance benefits are a mandatory subject of collective-bargaining agreement that an employer may not alter without bargaining to mutual agreement or a good-faith impasse. *Mid-Continent Concrete*, 336 NLRB 258 (2001), enfd. 308 F.3d 859 (8th Cir. 2002). The law concerning waiver of statutory rights, here the right to be notified about a substantial change in a benefit, is clear, the waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693

(1983); See also, e.g., *Dearborn Country Club*, 298 NLRB 915 (1990). Board precedent is equally clear—"a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *King Soopers, Inc.*, 340 NLRB 628, 641 (2003), citing *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993), quoting *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). See also, e.g., *Mississippi Power Co.*, 332 NLRB 530, 531 (2000), quoting *Exxon Research & Engineering Co.*, 317 NLRB 675, 685–686 (1995), enf. denied on other grounds 89 F.3d 228 (5th Cir. 1996). "[U]nion acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past."

Assuming a good-faith impasse, the employer, generally, may implement the terms and conditions of employment that were contemplated by its preimpasse proposals. Not all preimpasse proposals, however, may be implemented. In *McClatchy Newspapers*, 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), the Board recognized a narrow exception to the implementation-upon-impasse rules. The employer in *McClatchy* insisted to impasse, and then implemented, a proposal reserving to itself sole discretion concerning merit wage increases. The Board observed that the right to implement previous proposals, does not mean the end of the bargaining process. The Board stated that if the employer was granted "carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the [union's] agreement)," the result would be inherently destructive of the fundamental principles of collective bargaining.

In *KSM Industries*, 336 NLRB 133 (2001), reconsideration granted in part 337 NLRB 987 (2002), substantive result unchanged, the Board held that the employer unlawfully implemented its medical and dental insurance proposal after reaching impasse. The employer's proposal reserved to its sole discretion the right to change unilaterally the provider, the plan design, the level of benefit and the administrator so long as the change was companywide. Without negotiation, or discussion, the Respondent changed the health insurance benefits, including increases in deductibles and out-of pocket expenses. The Respondent presented these changes to the union as a fait accompli. The Board found that the employer's implementation of the proposal was "inimical to the postimpasse, on-going collective-bargaining process" because it "left no room for bargaining between the union and the employer about the manner, method and means of providing medical and dental benefits during the term of the contract" and thus, "nullified the [u]nion's authority to bargain over the existence and the terms of a key term and condition of employment." Id. at 135. The Board specifically found "no principled reason" to distinguish *KSM* from *McClatchy* on the basis that *KSM* involves health insurance rather than wages. Id. at 135 fn. 6.

The Respondent's primary justification for unilaterally implementing the changes to the health benefit plan is that its action was consistent with the past practice of the parties. The employer has the burden of establishing that a unilateral post expiration change was consistent with past practice. *Eugene Lovine, Inc.*, 328 NLRB 294 fn. 2 (1999), enfd. mem. 242 F.3d 366 (2d Cir. 2001). From December 1993, when the Respondent terminated the collective-bargaining agreement and all supplemental agreements, until October 2001, the Respondent made unilateral changes to the health care coverage. The Union admits that before the April 23, 2001 implementation it did not demand bargaining or object to the various changes made to the Beneflex Plan. The fact that there was no formal objection does not mean that the Union agreed with the changes. Casinelli testified that at some point in time, and probably more than once, the Union challenged the Respondent's assertion that the settlement agreement permitted increasing all costs other than the premiums (Tr. 1786).

The Respondent places much reliance on *Post-Tribune Co.*, 337 NLRB 1279 (2002). In that case the Board found that the employer had a consistent, established past practice of allocating health insurance premiums on an 80/20-percent and 60/40-percent basis. Although the insurance carrier increased the premium, and, thus, the dollar amount of the employees payroll deduction, that did not alter the status quo, the employees continued to pay 20 or 40 percent of the new premium.

The Respondent does not appear to be contending that its changes to the premiums are based on past practice. It appears that the premium changes that were made by the Respondent between 1994 and February 21, 1997, were the subject of unfair labor practice charges that the parties settled in 1997. As a result of the settlement agreement the premium was frozen at the 1996 level. Thus, it was the settlement agreement that fixed the cost of the premium and not past practice.

The Respondent did, however, change the other cost factors related to the Beneflex plan on an annual basis. But these changes, were not consistent with maintaining the status quo. Unlike the employer in *Post-Tribune Co.*, the Respondent here, is itself the insurer. As such it determines not only the total cost share, but the costs, including the premiums, of the other cost share factors (Tr. 1777, 1788). For instance, in 1996 the Respondent determined that from then on the total health care costs world be shared on a 50/50 basis, rather than 80/20 (R. Exh. 86). In 1997, the Respondent chose to increase the monthly health care premium $20 per month "on average," in order to maintain what it determined was the employees' share of the overall health care cost. The Respondent defines "on average" as representing a composite of costs of all single, two-person and family coverage. The monthly average includes a portion for premiums with the balance resulting from a combination of copays, deductibles, and coinsurance. The actual costs varies depending on the employees use of medical services. (R. Exh. 89.)

The unfettered discretion that the Respondent has regarding the Beneflex Plan is yet another impediment to the postimpasse implementation of this proposal. Not only does article XIII retain for the Respondent the sole right to change or discontinue the plan, but Casinelli testified that the "design as to where the cost share elements would be changed was something that the company would do. It would be done on a company wide basis" (Tr. 1788). I find that this holding in *KSM* is controlling as to this portion of the case. Thus, the Respon-

dent's announced changes in October 2001 were presented not only as a fait accompli, but it then proceeded to ignore the union request that the changes be rescinded and that the Respondent bargain over any charge. As in *McClatchy* and *KSM* the Respondent's conduct nullified the Union's authority to bargain over the existence and the terms of a key term and condition of employment. Accordingly, as in *McClatchy* and *KSM*, I find the Respondent's implementation of the Beneflex Plan was inimical to the post impasse, on-going collective-bargaining process, I further find that the Union did not waive its right to bargain over the health plan, and thus, the Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented changes to the health benefit plan in effect for the unit employees without bargaining with the Union.

G. The Alleged Unilateral Implementation of Production Incentive Programs

In paragraphs IX(b), (o), and (p) and XI of the complaint the General Counsel submits that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing four production incentive programs in the Corian bowl sanding and finishing department without providing the Union with notice and an opportunity to bargain concerning these programs. At the hearing the counsel for the General Counsel moved to amend paragraph IX(b) of the second amended consolidated complaint to specify the four incentive programs at issue. The incentive programs and the alleged dates of implementation are: (1) 100 bowl club, June 30, 1998; (2) packing 600 bowls or units by an entire shift, April 14, 2000; (3) packing 2500 units in one week by an entire shift, August 18, 2000; and (4) sealing or packing three trucks, December 5, 2000. (Tr. 466; GC Exh. 24.)

The motion to amend was granted over the Respondent's objection. The Respondent argues, at the hearing, and in its brief, that three of the programs are barred by Section 10(b) of the Act because the alleged implementation of each is more than 6 months before the filing of the charge. The charge was filed on March 5, 2001, hence the 10(b) period began on September 5, 2000. Thus, the only incentive program within the 6-month period is the sealing or packing three trucks, allegedly implemented on December 5, 2000. Counsel for the General Counsel acknowledges that the other implementation dates are outside of the 10(b) period, but argues that the time period only starts when the Union has actual or constructive notice that is clear and unequivocal of the unlawful activity or when a party in the exercise of reasonable diligence should have been aware that there has been a violation of the Act. Counsel for the General Counsel contends that the record does not establish that the Union knew about the award programs before January 19, 2001, when it requested information concerning the program. The request for information is also a complaint allegation, which is addressed above. The incentive programs and request for information allegations are separate from, and independent of, each other.

I will first address the "sealing and packing three trucks" allegation that was implemented on December 5, 2000, a date which the parties agree is within the 10(b) period.

1. Facts

The parties agree that a "Plant Recognition Procedure" has been in place since at least February 1995 (GC Exh. 50). The written procedure is a lengthy, detailed document, the stated purpose of which is to: (1) accelerate change in an organization's culture to create a positive environment; (2) communicate and reinforce desired behaviors and values; (3) reward extraordinary accomplishments; or (4) motivate contributions to business objectives. The procedure even has a provision for including spouses in the recognition.

The parties also agree that since the creation of the Plant Recognition Procedure, employees could earn "safety bucks." These were valued between $.50 and $1 and were awarded for working safely, participating in safety meeting, and safety improvements. They could be redeemed for movie passes or gift certificates that could be used at various retail stores and restaurants. Two union witnesses testified that in addition to safety, the awards were given for "certain milestones" such as attendance (Tr. 367) or improvements that could "help the corporate goals"(Tr. 170). Guralny also stated that in August 1999 he was the chairman of the safety committee. In that capacity he chaired a union-management safety meeting in August 1999, where "awards being given for certain numbers" was mentioned (Tr. 583–586.)[4] The Union is not protesting the award of safety bucks or the recognition program in general. The dispute centers on recognition awards that are based on numbers. Counsel for the General Counsel refers to those as unlawful, unilaterally implemented, production incentives. The Respondent contends that they are part of the evolving continuum of the employee recognition procedure that has been ongoing since 1995.

2. Analysis and discussion

It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees' bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications. *NLRB V. Katz,* 369 U.S. 736, 743 (1962). It is equally well established that a unilateral change in a mandatory subject of bargaining is unlawful only if it is "material, substantial, and significant." *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

I agree with counsel for the General Counsel that the awards are a mandatory subject of bargaining, and the Respondent does not argue to the contrary, I disagree with the cases cited in support of that proposition. In *Branch International Services*, 310 NLRB 1092, 1097 (1993), the "production incentive pay system" in issue, represented 25 percent of an employee's earnings. In *Jimmy Dean Meat Co.*, 227 NLRB 1527, 1528 (1977), the employer unilaterally implemented a new incentive bonus plan as a substitute for twice yearly general wage increases. Here there is no evidence that the awards in issue involved cash, let alone a substantial amount of cash.

In fact one of the stated principles of the recognition procedure is that "[c]are must be exercised not to provide such large

[4] Counsel for the General Counsel relies on R. Exhs. 10 and 11. Although identified on the record, they were not moved into evidence.

awards that it infringes upon compensation." Although there are target percentages for the number of employees to be recognized, the percentages are not quotas. (GC Exh. 50, pp. 7771, 7775.) There is no evidence that any employee was told that they were required to produce a certain amount, or complete a certain task, within a fixed timeframe. There is no evidence that any employee was disciplined for not producing a certain amount, or for not completing a certain task within a fixed time frame. There is no evidence that any employees was ever disciplined for never getting an award. The recognition procedure under which the Respondent issues the recognition awards is a bona fide recognition procedure, the establishment of which is not under challenge by the General Counsel. The award implemented on December 5, 2000, is not a material, substantial, and significant change from the Respondent's preexisting recognition program. It is the same as the other three awards in issue and I find that all the awards are totally consistent with, and part of, the Respondent's well documented and longstanding recognition procedure. As with any valid recognition plan, the objectives and the accomplishments that management wants to recognize will, from time-to-time, change. If the new objectives, achievements, and awards are not material, substantial, and significant changes to the existing employee recognition plan or procedure, the employer has maintained the status quo, and has not violated the Act. I find this to be the case here and accordingly, I recommend that this allegation be dismissed.

3. Alternate finding

I have recommended that the one timely allegation contained in paragraph IX(b) of the complaint be dismissed. There is no contention that the three remaining, untimely allegations, differ in any substantive way from the timely allegation. Because the result would be the same, I see no need to address the 10(b) issue. I will, however, make the requisite findings, in case the Board finds it necessary to address the 10(b) issue.

Section 10(b) states in pertinent part that "[N]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Section 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense which must be pleaded and if not timely raised, is waived. E.g., *Federal Management Co.*, 264 NLRB 107 (1982). The burden of proving an affirmative defense is on the party asserting the defense. E.g., *Kelly's Private Care Service*, 289 NLRB 30 (1988). Although the statute of limitations period begins only when the unfair labor practice occurs, Section 10(b) is tolled until there is either actual or constructive notice of the alleged unfair labor practice. E.g., *Mine Workers Local 17*, 315 NLRB 1052 (1994). Notice, however, may be found even in the absence of actual knowledge if a charging party has failed to exercise reasonable diligence, i.e., the 10(b) period commence s running when the charging party either knows of the unfair labor practice or would have "discovered" it in the exercise of "reasonable diligence." *Oregon Steel Mills*, 291 NLRB 185, 192 (1988). The knowledge of bargaining unit employees concerning their terms and conditions of employment may be imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences depending on the factual context. *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995).

Guralny, the president of the local union, testified that he chaired a union-management safety meeting in August 1999, were "awards being given for certain numbers" was mentioned (Tr. 582–584). I do not credit his statement that he did not pay attention to that part of the conversation. I also note that Guralny credibly testified in regard to the incident were he was denied access to an area to investigate a grievance, above, that he had never been denied access to visit any area of the plant at anytime (Tr. 262–264). The record also demonstrates that the Union acted on rumors, and information that it got through the "grapevine" (Tr. 711–712), indicating that it had, at the very least, an adequate communications network throughout the facility.

Rory Watson, CCMC production superintendent from 1997 to 2000 (Tr. 309), identified several Union stewards and representatives who received awards dating back to 1999 (GC Exh. 5a). The most convincing evidence that the Union should have "discovered" the awards program, had it exercised any amount of diligence, is from the testimony of employees Germain Williams and Kathy Eagen. They testified that the awards were announced by first-line supervision at the daily shift meetings. The awards, as well as letters of recognition, were presented to the employees during these meetings. Thus, in agreement with the Respondent, I find that the recognition program at the facility was "open and notorious." This practice is also consistent with a stated objective of the program, "to communicate and reinforce desired behaviors and values" (GC Exh. 50 p. 7768). Based on the foregoing I would find, if necessary, that the Respondent has met its burden of showing that the three earliest allegations contained in paragraph IX(b) of the complaint (GC Exh. 24) are untimely under Section 10(b) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material here, the Union, as the successor to the Buffalo Yerkes Union, has been the exclusive collective-bargaining representative of the employees in the following unit that is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All production and maintenance employees at Respondent's Tonawanda, New York, facility, including plant clericals, analysts, and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

4. The Respondent, by Rory Watson and Anthony Casinelli, violated Section 8(a)(1) of the Act on September 23, 2000, by denying access to its Tonawanda, New York facility to union representatives investigating grievances.

5. The Respondent, by Rory Watson violated Section 8(a)(1) of the Act on September 23, 2000, by threatening representa-

tives of the Union with discipline if they failed to leave Respondent's Tonawanda, New York facility.

6. The Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying in providing relevant and necessary information to the Union on September 28, 2000, regarding milling and finishing matters, as alleged in paragraphs VIII(a) and (f), and XI of the complaint.

7. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provided relevant and necessary information to the Union on January 19, 2001, regarding incentive programs and investigative notes, as alleged in paragraphs VIII(b), (c), (g), and (h), and XI of the complaint.

8. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provided relevant and necessary information to the Union on April 23, 2001, regarding the subcontracting of milling and finishing work, as alleged in paragraphs VIII(d) and (i), and XI of the complaint.

9. The Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain over the Union's visitation of job sites located outside the Respondent's Tonawanda, New York facility, where bargaining unit work is being performed.

10. The Respondent violated Section 8(a)(1) and (5) of the Act by, since on or about March 19, 2001, refusing to bargain over milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement and insisting that this issue be discussed in separate negotiations.

11. The Respondent violated Section 8(a)(1) and (5) of the Act by, since on or about May 1, 2001, subcontracting the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract the milling and finishing work on Corian bowls.

12. The Respondent violated Section 8(a)(1) and (5) of the Act by, on or about April 12, 2001, prematurely declaring an impasse in bargaining for a successor agreement and announcing it would implement its final offer on April 23, 2001, notwithstanding its failure to reach a good-faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls.

13. The Respondent violated Section 8(a)(1) and (5) of the Act by, on or about April 23, 2001, unilaterally implementing terms and conditions of employment that were a part of its final offer, notwithstanding that the parties were not at a good-faith impasse in bargaining.

14. The Respondent violated Section 8(a)(1) and (5) of the Act by, on or about October 1, 2001, unilaterally implementing changes to the health benefit plan in effect for unit employees, including, but not limited to, changes to employee premiums, copays, deductibles and stop losses, prescription drug payments, health insurance options, and working spouse coverage.

15. The Respondent did not violate Section 8(a)(1) and (5) of the Act by, engaging in effects bargaining at a time when bargaining over the decision to subcontract the milling and finishing work on Corian bowls had not been completed.

16. The Respondent did not violate Section 8(a)(1) and (5) of the Act by setting a deadline for conclusion of bargaining over a severance plan for those employees who would be displaced as a result of the subcontracting of milling and finishing work on Corian bowls.

17. The Respondent did violate Section 8(a)(1) and (5) of the Act by unilaterally implementing a production incentive program.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The counsel for the General Counsel requests that the remedy in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), be awarded, as well as, a restoration order restoring the Corian milling and finishing bargaining unit work to the Respondent's facility. The *Transmarine* remedy is the traditional remedy for an effects bargaining violation. E.g., *Champion International Corp.*, 339 NLRB 672 (2003). I have found that the Respondent failed to bargain in good faith over the decision to subcontract the Corian milling and finishing bargaining unit work. I find that this case is appropriate for a remedy that would restore the status quo ante, including restoration of the milling and finishing work, and the standard reinstatement and backpay order. Accordingly, I shall recommend that the Respondent restore the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to its facility in Tonawanda, New York. At the compliance stage of this proceeding the Respondent may introduce evidence, that was not available at the time of the unfair labor practice hearing, to establish that restoration of the work and the equipment is not appropriate. See *Cold Heading Co.*, 332 NLRB 956 fn. 5 (2000), and cited cases; *Elliott Turbomachinery Co.*, 320 NLRB 141 (1995); *Lear Sigler, Inc.*, 295 NLRB 857, 861–862 (1989).

In addition to restoring the Corian milling and finishing bargaining unit work, I recommend that the Respondent offer the employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I have found that the Respondent violated Section 8(a)(1) and (5) of the Act by, on or about April 23, 2001, unilaterally implementing terms and conditions of employment that were a part of its final offer, notwithstanding the absence of a valid good-faith impasse in bargaining. I have also found that the Respondent violated Section 8(a)(1) and (5) of the Act by, on or about October 1, 2001, unilaterally implementing changes to the health benefit plan in effect for unit employees, including, but not limited to, changes to employee premiums, copays, deductibles and stop losses, prescription drug payments, health insurance options, and working spouse coverage. Accordingly, I shall recommend that the Respondent, on the request of the Union, rescind any changes in the terms and conditions of employment that it has unlawfully implemented. To the extent that unit employees suffered economic detriment as a conse-

quence of the Respondent's unlawful unilateral changes the Respondent is required to make them whole, plus interest as computed in *New Horizons for the Retarded*, supra.

Counsel for the General Counsel also requests that the Board order the Respondent to "reimburse employees entitled to a monetary award for any extra Federal and/or State income taxes that would or may result from the lump sum payment of the award." This aspect of the proposed Order would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), enfd. 762 F.2d 990 (2d Cir. 1985). This issue has not been briefed by the parties and because it involves a change in Board law, it is best reserved for the Board. Accordingly, the request to include the additional relief is denied. *Campbell Electric Co.*, 340 NLRB 825, 827 fn. 11 (2003).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, E.I. du Pont de Nemours & Company, Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employees, serving in their capacities as union representatives, access to the facility when they are attempting to investigate potential grievances.

(b) Threatening representatives of the Union with discipline for refusing to leave the facility when they are investigating potential grievances.

(c) Unreasonably delaying providing relevant and necessary information to the Union regarding milling and finishing matters.

(d) Failing and refusing to provided relevant and necessary information to the Union regarding incentive programs and investigative notes.

(e) Failing and refusing to provided relevant and necessary information to the Union regarding the subcontracting of milling and finishing work.

(f) Refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit of employees set forth below, concerning the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed. The appropriate unit is:

> All production and maintenance employees at Respondent's Tonawanda, New York, facility, including plant clericals, analysts, and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

(g) Refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit of employees set forth above, over milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement and insisting that this issue be discussed in separate negotiations.

(h) Subcontracting the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract the milling and finishing work on Corian bowls.

(i) Prematurely declaring an impasse in bargaining for a successor agreement and announcing it would implement its final offer on April 23, 2001, notwithstanding its failure to reach a good faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls.

(j) Unilaterally implementing terms and conditions of employment that were a part of its final offer, notwithstanding that the parties were not at a good-faith impasse in bargaining.

(k) Unilaterally implementing changes to the health benefit plan in effect for unit employees.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Restore and resume the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to its facility in Tonawanda, New York, and offer those employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make the employees whole for any loss of earnings and other benefits suffered from their date of layoff to date of proper offer of reinstatement, as set forth in the remedy section of this decision.

(c) On request of the Union rescind any changes in the terms and conditions of employment of unit employees that it implemented on or after April 23, 2001.

(d) On request of the Union grant access to employees serving in their capacities as union representatives to the facility, for a reasonable period of time, to allow them to investigate potential grievances.

(e) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, set forth above, concerning terms and conditions of employment, including but not limited to, the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed, and the decision to subcontract the milling and finishing work on Corian bowls, and, if an understanding is reached, embody the understanding in a signed agreement.

(f) On request of the Union, bargain with it over the terms and conditions of employment concerning Corian milling and finishing work in the same negotiating forum that is used to address wages, hours, and all other terms and conditions of employment for bargaining unit employees.

(g) Provide the Union, to the extent that it has not already done so, with the relevant information it requested on September 28, 2000, regarding milling and finishing matters, on Janu-

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ary 19, 2001, regarding incentive programs and investigative notes and on April 23, 2001, regarding the subcontracting of the Corian milling and finishing work.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Tonawanda, New York, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2000.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 24, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain collectively and in good faith with Paper, Allied-Industrial, Chemical and Energy Workers, International Union (PACE) and its Local 1-6992, as the exclusive collective-bargaining representative of the employees in the appropriate unit by refusing to bargain about the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed, by refusing to bargain about milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement and insisting that this issue be discussed in separate negotiations, by prematurely declaring an impasse in bargaining for a successor agreement, and implementing our final offer on April 23, 2001, notwithstanding the absence of a good-faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls. The appropriate unit is:

> All production and maintenance employees at our Tonawanda, New York, facility, including plant clericals, analysts, and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally subcontract the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract that work.

WE WILL NOT unilaterally implement changes to the health benefit plan without notifying the Union and affording it an opportunity to bargain.

WE WILL NOT unilaterally change the terms and conditions of employment of unit employees unless we have reached a valid impasse in bargaining regarding all issues that are still on the bargaining table.

WE WILL NOT deny employees, serving as union representatives, access to the facility when they are attempting to investigate potential grievances.

WE WILL NOT threaten representatives of the Union with discipline for refusing to leave the facility when they are investigating potential grievances.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union by unreasonably delaying providing relevant and necessary information to the Union regarding milling and finishing matters, and by failing and refusing to provide relevant and necessary information to the Union regarding incentive programs and investigative notes, and the subcontracting of the Corian milling and finishing work.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL restore and resume the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to our facility in Tonawanda, New York, and offer those employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL make the employees whole for any loss of earnings and other benefits suffered from their date of layoff to date of proper offer of reinstatement, as set forth in the remedy section of this decision.

WE WILL on request of the Union grant access, to employees serving as union representatives, to the facility for a reasonable period of time, to allow them to investigate potential grievances.

WE WILL on request of the Union rescind any changes in the terms and conditions of employment of unit employees that we implemented on or after April 23, 2001.

WE WILL on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, set forth above, concerning terms and conditions of employment, including but not limited to, the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed, and the decision to subcontract the milling and finishing work on Corian bowls, and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL on request of the Union, bargain over the terms and conditions of employment concerning Corian milling and finishing work in the same negotiating forum that addresses wages, hours, and all other terms and conditions of employment for bargaining unit employees.

WE WILL provide the Union, to the extent that we have not already done so, with the relevant information it requested on September 28, 2000, regarding milling and finishing matters, on January 19, 2001, regarding incentive programs and investigative notes, and on April 23, 2001, regarding the subcontracting of the Corian milling and finishing work.

E.I. DU PONT DE NEMOURS & COMPANY